

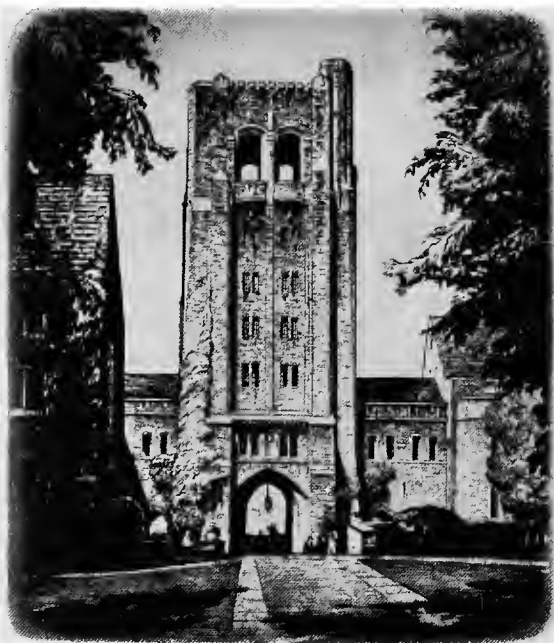


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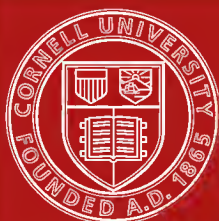
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The Negotiable Instruments Law Annotated

WITH

*References to the English Bills of Exchange
Act and with the Cases under the
Negotiable Instruments Law and
the Bills of Exchange Act
and Comments thereon*

BY

JOSEPH DODDRIDGE BRANNAN

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Together with Comments and Criticisms on the
Negotiable Instruments Law

(Reprinted from the Harvard Law Review, the Yale Law Journal and the American Law Register)

BY

JAMES BARR AMES (Dean of the Harvard Law School),
JUDGE LYMAN D. BREWSTER (Formerly President of the
State Boards of Commissioners for Promoting Uniformity of Legis-
lation), and CHARLES L. MCKEEHAN, Esq. (Formerly Lecturer
on the Law of Bills and Notes in the University of Pennsylvania)

SECOND EDITION

REVISED—RE-ARRANGED—ENLARGED

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1911

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PREFACE TO FIRST EDITION

THE Negotiable Instruments Law is based upon and largely copied from the English Bills of Exchange Act, a codification of the law of England as to bills of exchange, promissory notes and checks, which was drawn by Judge Chalmers and enacted by Parliament in 1882.¹

At a meeting of the National Conference of State Boards of Commissioners for Promoting Uniformity of Legislation in the United States, held in August, 1895, a committee was appointed, who caused a draft of a bill codifying the law of negotiable instruments to be prepared and submitted to the Conference at its annual meeting in August, 1896. This draft, entitled "The Negotiable Instruments Law," was discussed by the Conference and was agreed upon for recommendation to the Legislatures of the States.² The law has been adopted in the District of Columbia and in thirty-four States and Territories,³ in a few cases with some modifications, but generally in the identical form recommended.

¹ Chalmers, Bills of Exchange, Introduction to Third Edition. See also *infra*, page 99 (page 220 in this edition).

² See a more extended history of the Law, *infra*, page 100 (page 221 in this edition).

³ **Alabama.**—Laws of 1907, page 660. In effect January 1, 1908.

Arizona.—R. S. 1901, Title XLIX. In effect September 1, 1901.

Colorado.—Laws of 1897, ch. 64. Approved April 20, 1897.

Connecticut.—Laws of 1897, ch. 74. Approved April 5, 1897.

District of Columbia.—Laws of 1899 (U. S. Stats.) ch. 47. In effect April 3, 1899.

Florida.—Laws of 1897, ch. 4524. Approved June 1, 1897.

Hawaii.—Laws of 1907, Act 89. In effect April 20, 1907.

Idaho.—Laws of 1903, page 380. In effect March 10, 1903.

Illinois.—Laws of 1907, page 403. Approved June 5, 1907.*

Iowa.—Laws of 1902, ch. 130. Approved April 12, 1902.

Kansas.—Laws of 1905, ch. 310. In effect June 8, 1905.

Kentucky.—Acts 1904, ch. 102. Approved March 24, 1904.

Louisiana.—Laws of 1904, Act 64. Approved June 29, 1904.

* The amendments suggested by Professor Ames, in the following articles, to sections 9, 29, 34, 37, 40, 49, 64, 66, 68, 70, 119, 120, 137, and 186 of the Law, as recommended by the Commissioners, were adopted in whole or in part in the Illinois Act.

The Negotiable Instruments Law, taken as the standard and herein given, is in the form recommended by the National Conference of State Boards of Commissioners. The sectional numbering of the Law, as adopted in several of the States, differs from that adopted in the Law as recommended by the Commissioners, but, as the headings of the titles and articles are the same, except in two or three States, which omit the headings altogether, there will be little difficulty in finding in the Law, as herein printed, the section corresponding to any given section of the Law as adopted in any particular State. Speedy reference may, however, be facilitated in any State, in which the sectional numbering has been changed, by writing opposite the sections as herein given the numbers of the sections of the Law as enacted in such State. In December, 1900, after the Law had been adopted in several States, Professor James Barr Ames, Dean of the Harvard Law School, published in the *Harvard Law Review* an article commending some features of the Law and criticising others. An answer to these criticisms, written by Judge Lyman D. Brewster, President of the National Conference of State Boards of Commissioners, was soon after published in the *Yale Law Journal*. This was followed by other articles by Professor Ames in defense of his position. Finally

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- Maryland.**—Laws of 1898, ch. 119. Approved March 29, 1898.
Massachusetts.—Laws of 1898, ch. 533. In effect January 1, 1899.
Massachusetts.—Laws of 1899, ch. 130. In effect March 6, 1899.
Michigan.—Public Acts 1905, page 389. Approved June 16, 1905.
Missouri.—Laws of 1905, page 243. Approved April 10, 1905.
Montana.—Laws of 1903, ch. 121. In effect March 7, 1903.
Nebraska.—Laws of 1905, ch. 83. In effect August 1, 1905.
New Jersey.—Laws of 1902, ch. 184. Approved April 4, 1902.
New Mexico.—Laws of 1907, ch. 83. Approved March 21, 1907.
New York.—Laws of 1897, ch. 612. Became a law May 19, 1897.
New York.—Laws of 1898, ch. 336. Became a law April 20, 1898.
North Carolina.—Laws of 1899, ch. 733. In effect March 8, 1899.
North Dakota.—Laws of 1899, ch. 113. Approved March 7, 1899.
Ohio.—Laws of 1902, page 162. In effect January 1, 1903.
Oregon.—Laws of 1899, page 18. Approved February 16, 1899.
Pennsylvania.—Laws of 1901, page 194. In effect September 2, 1901.
Rhode Island.—Laws of 1899, ch. 674. In effect July 1, 1899.
Tennessee.—Laws of 1899, ch. 94. In effect May 16, 1899.
Utah.—Laws of 1899, ch. 83. In effect July 1, 1899.
Virginia.—Laws of 1897-8, ch. 866. Approved March 3, 1898.
Washington.—Laws of 1899, ch. 149. In effect March 22, 1899.
West Virginia.—Acts of 1907, ch. 81. In effect January 1, 1908.
Wisconsin.—Laws of 1899, ch. 356. In effect May 15, 1899.
Wyoming.—Laws of 1905, ch. 43. In effect February 15, 1905.

Mr. Charles L. McKeehan, Lecturer on Bills and Notes in the Law Department of the University of Pennsylvania, published in the *American Law Register* (now the *U. of P. Law Review*) a "Review of the Ames-Brewster Controversy." In 1902 a compilation consisting of the Negotiable Instruments Law and of the articles by Professor Ames and Judge Brewster was published by the Harvard Law Review Publishing Association for use as an aid to teacher and pupil in the course on Bills and Notes in the Harvard Law School. This compilation has not only been found useful in that course, but has proved of service to the legal profession and to law students generally. Mr. McKeehan's "Review of the Ames-Brewster Controversy," which appeared too late to be included in the former compilation, is so interesting and instructive that it seems highly desirable that it should be made more conveniently accessible by including it within the same covers as the articles reviewed. It seemed also that it would be advisable to set opposite each other in parallel columns the corresponding provisions of the Bills of Exchange Act and of the Negotiable Instruments Law. But this has been found impracticable because of the difference in the structure of the two statutes, a difference which must be borne in mind in comparing the two statutes and in searching them for equivalent provisions.

Part I of the Bills of Exchange Act is devoted to definitions of terms used in the Act. Part II deals with bills of exchange and enacts rules as to Form and Interpretation, Capacity and Authority of Parties, Consideration, Negotiation, General Duties of the Holder, Liabilities of Parties, Discharges, etc. Part III, after providing that in general the provisions applicable to bills of exchange payable on demand shall apply to a check, enacts certain rules specially applicable to checks. Part IV makes certain special provisions as to promissory notes, and then provides that, subject to certain exceptions, the provisions of the Act relating to bills of exchange shall, with the necessary modifications, apply to promissory notes. Part V contains certain supplementary provisions, some of which are not applicable to this country.

Title I of the Negotiable Instruments Law, while dealing with the same subjects as Part II of the Bills of Exchange Act, groups bills of exchange and promissory notes under the designation of "instruments," and states the rules applicable to both kinds of negotiable instruments. Title II provides rules relating only to bills of exchange. Title III gives a definition of promissory notes and adds a few provisions peculiar to checks. Title IV defines a

number of words used in the Law and makes also a few general provisions.

It will thus be seen that many of the provisions which are common to both statutes are enacted in the Negotiable Instruments Law as to both bills and notes, under the general description of instruments, while, in the Bills of Exchange Act, they are specially enacted as of bills of exchange and made applicable to promissory notes only by the general provision of Part IV of that Act. But while it has not seemed feasible to illustrate the differences between the two statutes by the parallel column method, the plan has been adopted of giving in the notes to the Negotiable Instruments Law those sections of the Bills of Exchange Act which differ more or less from the corresponding provisions of the Negotiable Instruments Law, and of noting the fact wherever any particular provision of the Negotiable Instruments Law is not found in the Bills of Exchange Act. The absence of a note to any provision of the Negotiable Instruments Law indicates that the Bills of Exchange Act contains substantially the same provision, although the language may sometimes differ.

An Appendix sets forth such provisions of the Bills of Exchange Act as have not been adopted by the Negotiable Instruments Law and have not already been mentioned or quoted in the notes to the Negotiable Instruments Law. Tables of the corresponding sections of the two statutes are also given in an Appendix. The fact that a provision is to be found in the one statute, but not in the other, does not necessarily mean that the principle set forth in such provision is not the law in the other country, for both statutes contain provisions to cover such omissions, the Bills of Exchange Act providing in section 97 (2) that "The rules of common law, including the law merchant, save so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and checks," and the Negotiable Instruments Law providing in section 196 that "In any cases not provided for in this act the rules of the law merchant shall govern."

It is not within the scope of this work to annotate those sections of the Law under which no cases have been decided. This has been done in other books. But all the cases decided under the Bills of Exchange Act and under the Negotiable Instruments Law and reported to April 1, 1908, have been examined and, with a few exceptions, deemed unimportant, have been given in Appendices with cross-references and comments.

In addition to the articles in this compilation the student will find the Negotiable Instruments Law discussed in articles by Hon. Amasa M. Eaton, now President of the National Conference of State Boards of Commissioners, 2 *Michigan Law Rev.* 260; by John Lawrence Farrell, Esq., 3 *Brief of Phi Delta Phi* 131, 5 *Ib.* 1; by Judge Julian W. Mack, 1 *Illinois Law Rev.* 592; by Professor Louis M. Greely, 2 *Illinois Law Rev.* 145. See also a series of articles in 16 *Banking Law Journal*, beginning at page 315.

On behalf of *The Harvard Law Review* and of himself the Editor gratefully acknowledges the courtesy of the *Yale Law Journal*, the *American Law Register*, and of Judge Brewster and Mr. McKeehan in granting permission for the republication of their articles. And the Editor also acknowledges his indebtedness to the Hon. Amasa M. Eaton for copies of his lists of cases decided under the Negotiable Instruments Law and for other valuable information. Although great care has been taken in the comparison of the English and American statutes and in other respects. it is too much to hope that the result is without fault. The Editor will, therefore, consider it a favor to have his attention called to any errors which may be discovered in any part of this work.

J. D. BRANNAN.

CAMBRIDGE, MASS., July, 1908.

PREFACE TO SECOND EDITION.

In this edition the book has been rearranged. The articles on the Negotiable Instruments Law by Professor Ames, Judge Brewster and Mr. McKeehan have been preserved in full for the benefit of the student and the practicing lawyer, but a brief summary of the comments and criticisms in the articles has been placed after each of the sections therein discussed. The English and American cases which in the first edition were given in Appendices III and IV have been brought under the sections to which they relate, and all the cases decided under the Bills of Exchange Act and the Negotiable Instruments Law since the preparation of the first edition have been added. Some of these recent cases are cited generally, but of the most of them brief abstracts are given with frequent comments by the editor.

A new feature consists in a statement after each section of the changes, if any, made in the Law by the various States which have adopted it.

A table showing the corresponding sections of the Law as found in the statutes of the different States has been added. Cumulative references to the regular reports, the National Reporter System, the American State Reports and the Lawyers Reports Annotated are made as to all the cases cited or abstracted.

Appendix I containing those provisions of the Bills of Exchange Act which were not adopted by the Negotiable Instruments Law is retained, and abstracts of the cases decided under such provisions have been added. Appendix II containing comparative tables of the sections of the Bills of Exchange Act and the Negotiable Instruments Law is also retained.

It is hoped that the changes made in this edition will make the book more useful to the Bench and the Bar without impairing its value to the student.

J. D. BRANNAN.

November, 1910.

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- Alabama.**—Laws of 1907, page 660. In effect January 1, 1908.
Arizona.—R. S. 1901, Title XLIX. In effect September 1, 1901.
Colorado.—Laws of 1897, ch. 64. Approved April 20, 1897.
Connecticut.—Laws of 1897, ch. 74. Approved April 5, 1897.
District of Columbia.—Laws of 1899 (U. S. Stats.), ch. 47. In effect April 3, 1899.
Florida.—Laws of 1897, ch. 4524. Approved June 1, 1897.
Hawaii.—Laws of 1907, Act 89. In effect April 20, 1907.
Idaho.—Laws of 1903, page 380. In effect March 10, 1903.
Illinois.—Laws of 1907, page 403. Approved June 5, 1907.*
Iowa.—Laws of 1902, ch. 130. Approved April 12, 1902.
Kansas.—Laws of 1905, ch. 310. In effect June 8, 1905.
Kentucky.—Acts 1904, ch. 102. Approved March 24, 1904.
Louisiana.—Laws of 1904, Act 64. Approved June 29, 1904.
Maryland.—Laws of 1898, ch. 119. Approved March 29, 1898.
Massachusetts.—Laws of 1898, ch. 533. In effect January 1, 1899.
Massachusetts.—Laws of 1899, ch. 130. In effect March 6, 1899.
Michigan.—Public Acts 1905, page 389. Approved June 16, 1905.
Missouri.—Laws of 1905, page 243. Approved April 10, 1905. In effect June 16, 1905 (see *Nat. Bank of Commerce v. Mechanics' Am. Nat. Bank*, 127 S. W. 429).
Montana.—Laws of 1903 ch. 121. In effect March 7, 1903.
Nebraska.—Laws of 1905, ch. 83. In effect August 1, 1905.
Nevada.—Laws of 1907, ch. 62. In effect May 1, 1907.
New Jersey.—Laws of 1902, ch. 184. Approved April 4, 1902.
New Hampshire.—Laws of 1909, ch. 128. In effect January 1, 1910.
New Mexico.—Laws of 1907, ch. 83. Approved March 21, 1907.
New York.—Laws of 1897, ch. 612. Became a law May 19, 1897.
New York.—Laws of 1898, ch. 336. Became a law April 20, 1898.
North Carolina.—Laws of 1899, ch. 733. In effect March 8, 1899.
North Dakota.—Laws of 1899, ch. 113. Approved March 7, 1899.
Ohio.—Laws of 1902, page 162. In effect January 1, 1903.
Oklahoma.—Laws of 1909, ch. 24. Approved March 20, 1909.
Oregon.—Laws of 1899, page 18. Approved February 16, 1899.
Pennsylvania.—Laws of 1901, page 194. In effect September 2, 1901.
Rhode Island.—Laws of 1899, ch. 674. In effect July 1, 1899.
Tennessee.—Laws of 1899, ch. 94. In effect May 16, 1899.
Utah.—Laws of 1899, ch. 83. In effect July 1, 1899.
Virginia.—Laws of 1897-8, ch. 866. Approved March 3, 1898.
Washington.—Laws of 1899, ch. 149. In effect March 22, 1899.
West Virginia.—Acts of 1907, ch. 81. In effect January 1, 1908.
Wisconsin.—Laws of 1899, ch. 356. In effect May 15, 1899.
Wyoming.—Laws of 1905, ch. 43. In effect February 15, 1905.

* The amendments suggested by Professor Ames, in the following articles, to sections 9, 29, 34, 37, 40, 49, 64, 66, 68, 70, 119, 120, 137, and 186 of the Law, as recommended by the Commissioners, were adopted in whole or in part in the Illinois Act.

TABLE OF CORRESPONDING SECTIONS OF THE LAW IN THE VARIOUS STATES AND TERRITORIES

X	1	2	3	4	5	6	7	8	9	10	11	12	13
N. I. L.	Ala.	Ariz.	Col.	Conn.	D. C.	Fla.	Ida.	Ill.	Kan.	Ky.	Md.	Mass.	Mich.
1	4958	3304	4464	4171	1305	2935	3458	1	4540	1897	20	18	3
2	4959	3305	4465	4172	1306	2936	3459	2	4541	1898	21	19	4
3	4960	3306	4466	4173	1307	2937	3460	3	4542	1899	22	20	5
4	4961	3307	4467	4174	1308	2938 2939	3461	4	4543	1900	23	21	6
5	4962	3308	4468	4175	1309	2939	3462	5	4544	1901	24	22	7
6	4963	3309	4469	4176	1310	2940	3463	6	4545	1902	25	23	8
7	4964	3310	4470	4177	1312	2941	3464	7	4546	1903	26	24	9
8	4965	3311	4471	4178	1312	2942	3465	8	4547	1904	27	25	10
9	4966	3312	4472	4179	1313	2943	3466	9	4548	1905	28	26	11
10	4967	3313	4473	4180	1314	2944	3467	10	4549	1906	29	27	12
11	4968	3314	4474	4181	1315	2945	3468	11	4550	1907	30	28	13
12	4969	3315	4475	4182	1316	2946	3469	12	4551	1908	31	29	14
13	4970	3316	4476	4183	1317	2947	3470	13	4552	1909	32	30	15
14	4971	3317	4477	4184	1318	2948	3471	14	4553	1910	33	31	16
15	4972	3318	4478	4185	1319	2949	3472	15	4554	1911	34	32	17
16	4973	3319	4479	4186	1320	2950	3473	16	4555	1912	35	33	18
17	4974	3320	4480	4187	1321	2951	3474	17	4556	1913	36	34	19
18	4975	3321	4481	4188	1322	2952	3475	18	4557	1914	37	35	20
19	4976	3322	4482	4189	1323	2953	3476	19	4558	1915	38	36	21
20	4977	3323	4483	4190	1324	2954	3477	20	4559	1916	39	37	22
21	4978	3324	4484	4191	1325	2955	3478	21	4560	1917	40	38	23
22	4979	3325	4485	4192	1326	2956	3479	22	4561	1918	41	39	24
23	4980	3326	4486	4193	1327	2957	3480	23	4562	1919	42	40	25
24	4981	3327	4487	4194	1328	2958	3481	24	4563	1884	43	41	26
25	4982	3328	4488	4195	1329	2959	3482	25	4564	1885	44	42	27
26	4982	3329	4489	4196	1330	2960	3483	26	4565	1886	45	43	28
27	4982	3330	4490	4197	1331	2961	3484	27	4566	1887	46	44	29
28	4983	3331	4491	4198	1332	2962	3485	28	4567	1888	47	45	30
29	4984	3332	4492	4199	1333	2963	3486	29	4568	1889	48	46	31
30	4985	3333	4493	4200	1334	2964	3487	30	4569	1939	49	47	32

TABLE OF CORRESPONDING SECTIONS OF THE LAW IN THE VARIOUS STATES AND TERRITORIES

X	14	15	16	17	18	19	20	21	22	23	24	25	26
N. I. L.	Mon.	Neb.	N. H.	N. Y.	N. C.	N. D.	Okl.	Ohio	Ore.	R. I.	Tenn.	Utah	Wis.
1	5849	1	1	20	2151	6303	1	3171	4403	7	1	1553	1675-1
2	5850	2	2	21	2152	6304	2	3171a	4404	8	2	1554	1675-2
3	5851	3	3	22	2153	6305	3	3171b	4405	9	3	1555	1675-3
4	5852	4	4	23	2156	6306	4	3171c	4406	10	4	1556	1675-4
5	5853	5	5	24	2154	6307	5	3171d	4407	11	5	1557	1675-5
6	5854	6	6	25	2155	6308	6	3171e	4408	12	6	1558	1675-6
7	5855	7	7	26	2157	6309	7	3171f	4409	13	7	1559	1675-7
8	5856	8	8	27	2158	6310	8	3171g	4410	14	8	1560	1675-8
9	5857	9	9	28	2159	6311	9	3171h	4411	15	9	1561	1675-9
10	5858	10	10	29	2160	6312	10	3171i	4412	16	10	1562	1675-10
11	5859	11	11	30	2161	6313	11	3171j	4413	17	11	1563	1675-11
12	5860	12	12	31	2162	6314	12	3171k	4414	18	12	1564	1675-12
13	5861	13	13	32	2163	6315	13	3171l	4415	19	13	1565	1675-13
14	5862	14	14	33	2164	6316	14	3171m	4416	20	14	1566	1675-14
15	5863	15	15	34	2165	6317	15	3171n	4417	21	15	1567	1675-15
16	5864	16	16	35	2166	6318	16	3171o	4418	22	16	1568	1675-16
17	5865	17	17	36	2341	6319	17	3171p	4419	23	17	1569	1675-17
18	5866	18	18	37	2167	6320	18	3171q	4420	24	18	1570	1675-18
19	5867	19	19	38	2168	6321	19	3171r	4421	25	19	1571	1675-19
20	5868	20	20	39	2169	6322	20	3171s	4422	26	20	1572	1675-20
21	5869	21	21	40	2170	6323	21	3171t	4423	27	21	1573	1675-21
22	5870	22	22	41	2180	6324	22	3171u	4424	28	22	1574	1675-22
23	5871	23	23	42	2171	6325	23	3171v	4425	29	23	1575	1675-23
24	5872	24	24	50	2172	6326	24	3171w	4426	30	24	1576	1675-50
25	5873	25	25	51	2173	6327	25	3171x	4427	31	25	1577	1675-51
26	5874	26	26	52	2174	6328	26	3171y	4428	32	26	1578	1675-52
27	5875	27	27	53	2175	6329	27	3171z	4429	33	27	1579	1675-53
28	5876	28	28	54	2176	6330	28	3172	4430	34	28	1580	1675-54
29	5877	29	29	55	2177	6331	29	3172a	4431	35	29	1581	1675-55
30	5878	30	30	60	2178	6332	30	3172b	4432	36	30	1582	1676

X	1	2	3	4	5	6	7	8	9	10	11	12	13
N. I. L.	Ala.	Ariz.	Col.	Conn.	D. C.	Fla.	Ida.	Ill.	Kan.	Ky.	Md.	Mass.	Mich.
31	4986	3334	4494	4201	1335	2965	3488	31	4570	1940	50	48	33
32	4987	3335	4495	4202	1336	2966	3489	32	4571	1941	51	49	34
33	4988	3336	4496	4203	1337	2967	3490	33	4572	1942	52	50	35
34	4989	3337	4497	4204	1338	2968	3491	34	4573	1943	53	51	36
35	4990	3338	4498	4205	1339	2969	3492	35	4574	1944	54	52	37
36	4991	3339	4499	4206	1340	2970	3493	36	4575	1945	55	53	38
37	4992	3340	4500	4207	1341	2971	3494	37	4576	1946	56	54	39
38	4993	3341	4501	4208	1342	2972	3495	38	4577	1947	57	55	40
39	4994	3342	4502	4209	1343	2973	3496	39	4578	1948	58	56	41
40	4995	3343	4503	4210	1344	2974	3497	40	4579	1949	59	57	42
41	4996	3344	4504	4211	1345	2975	3498	41	4580	1950	60	58	43
42	4997	3345	4505	4212	1346	2976	3499	42	4581	1951	61	57	44
43	4998	3346	4506	4213	1347	2977	3500	43	4582	1952	62	60	45
44	4999	3347	4507	4214	1348	2978	3501	44	4583	1953	63	61	46
45	5000	3348	4508	4215	1349	2979	3502	45	4584	1954	64	62	47
46	5001	3349	4509	4216	1350	2979	3503	46	4585	1955	65	63	48
47	5002	3350	4510	4217	1351	2980	3504	47	4586	1956	66	64	49
48	5003	3351	4511	4218	1352	2981	3505	48	4587	1957	67	65	50
49	5004	3352	4512	4219	1353	2982	3506	49	4588	1958	68	66	51
50	5005	3353	4513	4220	1354	2983	3507	50	4589	1958	69	67	52
51	5006	3354	4514	4221	1355	2984	3508	51	4590	1920	70	68	53
52	5007	3355	4515	4222	1356	2985	3509	52	4591	1921	71	69	54
53	5008	3356	4516	4223	1357	2986	3510	53	4592	1922	72	70	55
54	5009	3357	4517	4224	1358	2987	3511	54	4593	1923	73	71	56
55	5010	3358	4518	4225	1359	2988	3512	55	4594	1924	74	72	57
56	5011	3359	4519	4226	1360	2989	3513	56	4595	1925	75	73	58
57	5012	3360	4520	4227	1361	2990	3514	57	4596	1926	76	74	59
58	5013	3361	4521	4228	1362	2991	3515	58	4597	1927	77	75	60
59	5014	3362	4522	4229	1363	2992	3516	59	4598	1928	78	76	61
60	5015	3363	4523	4230	1364	2993	3517	60	4599	1929	79	77	62
61	5016	3364	4524	4231	1365	2994	3518	61	4600	1930	80	78	63
62	5017	3365	4525	4232	1366	2995	3519	62	4601	1931	81	79	64
63	5018	3366	4526	4233	1367	2996	3520	63	4602	1932	82	80	65
64	5019	3367	4527	4234	1368	2997	3521	64	4603	1933	83	81	66
65	5020	3368	4528	4235	1369	2998	3522	65	4604	1934	84	82	67
66	5021	3369	4529	4236	1370	2999	3523	66	4605	1935	85	83	68
67	5022	3370	4530	4237	1371	3000	3524	67	4606	1936	86	84	69
68	5023	3371	4531	4238	1372	3001	3525	68	4607	1937	87	85	70

X	14	15	16	17	18	19	20	21	22	23	24	25	26
N.I.L.	Mon.	Neb.	N. H.	N. Y.	N. C.	N. D.	Okl.	Ohio	Ore.	R. I.	Tenn.	Utah	Wis.
31	5879	31	31	61	2179	6333	31	3172c	4433	37	31	1583	1676-1
32	5880	32	32	62	2181	6334	32	3172d	4434	38	32	1584	1676-2
33	5881	33	33	63	2182	6335	33	3172e	4435	39	33	1585	1676-3
34	5882	34	34	64	2183	6336	34	3172f	4436	40	34	1586	1676-4
35	5883	35	35	65	2184	6337	35	3172g	4437	41	35	1587	1676-5
36	5884	36	36	66	2185	6338	36	3172h	4438	42	36	1588	1676-6
37	5885	37	37	67	2186	6339	37	3172i	4439	43	37	1589	1676-7
38	5886	38	38	68	2187	6340	38	3172j	4440	44	38	1590	1676-8
39	5887	39	39	69	2188	6341	39	3172k	4441	45	39	1591	1676-9
40	5888	40	40	70	2189	6342	40	3172 l	4442	46	40	1592	1676-10
41	5889	41	41	71	2190	6343	41	3172m	4443	47	41	1593	1676-11
42	5890	42	42	72	2191	6344	42	3172n	4444	48	42	1594	1676-12
43	5891	43	43	73	2192	6345	43	3172o	4445	49	43	1595	1676-13
44	5892	44	44	74	2193	6346	44	3172p	4446	50	44	1596	1676-14
45	5893	45	45	75	2194	6347	45	3172q	4447	51	45	1597	1676-15
46	5894	46	46	76	2195	6348	46	3172r	4448	52	46	1598	1676-16
47	5895	47	47	77	2196	6349	47	3172s	4449	53	47	1599	1676-17
48	5896	48	48	78	2197	6350	48	3172t	4450	54	48	1600	1676-18
49	5897	49	49	79	2198	6351	49	3172u	4451	55	49	1601	1676-19
50	5898	50	50	80	2199	6352	50	3172v	4452	56	50	1602	1676-20
51	5899	51	51	90	2200	6353	51	3172w	4453	57	51	1603	1676-21
52	5900	52	52	91	2201	6354	52	3172x	4454	58	52	1604	1676-22
53	5901	53	53	92	2202	6355	53	3172y	4455	59	53	1605	1676-23
54	5902	54	54	93	2203	6356	54	3172z	4456	60	54	1606	1676-24
55	5903	55	55	94	2204	6357	55	3173	4457	61	55	1607	1676-25
56	5904	56	56	95	2205	6358	56	3173a	4458	62	56	1608	1676-26
57	5905	57	57	96	2206	6359	57	3173b	4459	63	57	1609	1676-27
58	5906	58	58	97	2207	6360	58	3173c	4460	64	58	1610	1676-28
59	5907	59	59	98	2208	6361	59	3173d	4461	65	59	1611	1676-29
60	5908	60	60	110	2209	6362	60	3173e	4462	66	60	1612	1677
61	5909	61	61	111	2210	6363	61	3173f	4463	67	61	1613	1677-1
62	5910	62	62	112	2211	6364	62	3173g	4464	68	62	1614	1677-2
63	5911	63	63	113	2212	6365	63	3173h	4465	69	63	1615	1677-3
64	5912	64	64	114	2213	6366	64	3173i	4466	70	64	1616	1677-4
65	5913	65	65	115	2214	6367	65	3173j	4467	71	65	1617	1677-5
66	5914	66	66	116	2215	6368	66	3173k	4468	72	66	1618	1677-6
67	5915	67	67	117	2216	6369	67	3173l	4469	73	67	1619	1677-7
68	5916	68	68	118	2217	6370	68	3173m	4470	74	68	1620	1677-8

X	1	2	3	4	5	6	7	8	9	10	11	12	13
N. I. L.	Ala.	Ariz.	Col.	Conn.	D. C.	Fla.	Ida.	Ill.	Kan.	Ky.	Md.	Mass.	Mich.
69	5024	3372	4532	4239	1373	3002	3526	69	4608	1938	88	86	71
70	5025	3373	4533	4240	1374	3003	3527	70	4609	1990	89	87	72
71	5026	3374	4534	4241	1375	3004	3528	71	4610	1991	90	88	73
72	5027	3375	4535	4242	1376	3005	4529	72	4611	1992	91	89	74
73	5028	3376	4536	4243	1377	3006	3530	73	4612	1993	92	90	75
74	5029	3377	4537	4244	1378	3007	3531	74	4613	1994	93	91	76
75	5030	3378	4538	4245	1379	3008	3532	75	4614	1995	94	92	77
76	5031	3379	4539	4246	1380	3009	3533	76	4615	1996	95	93	78
77	5032	3380	4540	4247	1381	3010	3534	77	4616	1997	96	94	79
78	5033	3381	4541	4248	1382	3011	3535	78	4617	1998	97	95	80
79	5034	3382	4542	4249	1383	3012	3536	79	4618	1999	98	96	81
80	5035	3383	4543	4250	1384	3012	3537	80	4619	2000	99	97	82
81	5036	3384	4544	4251	1385	3013	3538	81	4620	2001	100	98	83
82	5037	3385	4545	4252	1386	3014	3539	82	4621	2002	101	99	84
83	5038	3386	4546	4253	1387	3015	3540	83	4622	2003	102	100	85
84	5038	3387	4547	4254	1388	3016	3541	84	4623	2004	103	101	86
85	5039	3388	4548	4255	1389	3017	3542	85	4624	2005	104	102	87
86	5040	3389	4549	4256	1390	3017	3543	86	4625	2006	105	103	88
87	5041	3390	4550	4257	1391	3018	3544	...	4626	2007	106	104	89
88	5042	3391	4551	4258	1392	3019	3545	87	4627	2008	107	105	90
89	5043	3392	4552	4259	1393	3020	3546	88	4628	1960	108	106	91
90	5044	3393	4553	4260	1394	3021	3547	89	4629	1961	109	107	92
91	5045	3394	4554	4261	1395	3022	3548	90	4630	1962	110	108	93
92	5046	3395	4555	4262	1396	3023	3549	91	4631	1963	111	109	94
93	5046	3396	4556	4263	1397	3024	3550	92	4632	1964	112	110	95
94	5047	3397	4557	4264	1398	3025	3551	93	4633	1965	113	111	96
95	5048	3398	4558	4265	1399	3026	3552	94	4634	1966	114	112	97
96	5048	3399	4559	4266	1400	3027	3553	95	4635	1967	115	113	98
97	5049	3400	4560	4267	1401	3027	3554	96	4636	1968	116	114	99
98	5050	3401	4561	4268	1402	3028	3555	97	4637	1969	117	115	100
99	5051	3402	4562	4269	1403	3029	3556	98	4638	1970	118	116	101
100	5052	3403	4563	4270	1404	3029	3557	99	4639	1971	119	117	102
101	5053	3404	4564	4271	1405	3030	3558	100	4640	1972	120	118	103
102	5054	3405	4565	4272	1406	3031	3559	101	4641	1973	121	119	104
103	5055	3406	4566	4273	1407	3031	3560	102	4642	1974	122	120	105
104	5056	3407	4567	4274	1408	3032	3561	103	4643	1975	123	121	106
105	5057	3408	4568	4275	1409	3033	3562	104	4644	1976	124	122	107

X	14	15	16	17	18	19	20	21	22	23	24	25	26
N.I.L.	Mon.	Neb.	N. H.	N. Y.	N. C.	N. D.	Okla.	Ohio	Ore.	R.I.	Tenn.	Utah	Wis.
69	5917	69	69	119	2218	6371	69	3173n	4471	75	69	1621	1677-9
70	5918	70	70	130	2219	6372	70	3173o	4472	76	70	1622	1678
71	5919	71	71	131	2220	6373	71	3173p	4473	77	71	1623	1678-1
72	5920	72	72	132	2221	6374	72	3173q	4474	78	72	1624	1678-2
73	5921	73	73	133	2222	6375	73	3173r	4475	79	73	1625	1678-3
74	5922	74	74	134	2223	6376	74	3173s	4476	80	74	1626	1678-4
75	5923	75	75	135	2224	6377	75	3173t	4477	81	75	1627	1678-5
76	5924	76	76	136	2225	6378	76	3173u	4478	82	76	1628	1678-6
77	5925	77	77	137	2226	6379	77	3173v	4479	83	77	1629	1678-7
78	5926	78	78	138	2227	6380	78	3173w	4480	84	78	1630	1678-8
79	5927	79	79	139	2228	6381	79	3173x	4481	85	79	1631	1678-9
80	5928	80	80	140	2229	6382	80	3173y	4482	86	80	1632	1678-10
81	5929	81	81	141	2230	6383	81	3173z	4483	87	81	1633	1678-11
82	5930	82	82	142	2231	6384	82	3174	4484	88	82	1634	1678-12
83	5931	83	83	143	2232	6385	83	3174a	4485	89	83	1635	1678-13
84	5932	84	84	144	2233	6386	84	3174b	4486	90	84	1636	1678-14
85	5933	85	85	145	2234	6387	85	3174c	4487	91	85	1637	1678-15
86	5934	86	86	146	2236	6388	86	3174d	4488	92	86	1638	1678-16
87	5935	...	87	147	2237	6389	87	3174e	4489	93	87	1639	1678-17
88	5936	87	88	148	2238	6390	88	3174f	4490	94	88	1640	1678-18
89	5937	88	89	160	2239	6391	80	3174g	4491	95	89	1641	1678-19
90	5938	89	90	161	2240	6392	90	3174h	4492	96	90	1642	1678-20
91	5939	90	91	162	2241	6393	91	3174i	4493	97	91	1643	1678-21
92	5940	91	92	163	2242	6394	92	3174j	4494	98	92	1644	1678-22
93	5941	92	93	164	2243	6395	93	3174k	4495	99	93	1645	1678-23
94	5942	93	94	165	2244	6396	94	3174l	4496	100	94	1646	1678-24
95	5943	94	95	166	2245	6397	95	3174m	4497	101	95	1647	1678-25
96	5944	95	96	167	2246	6398	96	3174n	4498	102	96	1648	1678-26
97	5945	96	97	168	2247	6399	97	3174o	4499	103	97	1649	1678-27
98	5946	97	98	169	2248	6400	98	3174p	4500	104	98	1650	1678-28
99	5947	98	99	170	2249	6401	99	3174q	4501	105	99	1651	1678-29
100	5948	99	100	171	2250	6402	100	3174r	4502	106	100	1652	1678-30
101	5949	100	101	172	2251	6403	101	3174s	4503	107	101	1653	1678-31
102	5950	101	102	173	2252	6404	102	3174t	4504	108	102	1654	1678-32
103	5951	102	103	174	2253	6405	103	3174u	4505	109	103	1655	1678-33
104	5952	103	104	175	2254	6406	104	3174v	4506	110	104	1656	1678-34
105	5953	104	105	176	2255	6407	105	3174w	4507	111	105	1657	1678-35

X	1	2	3	4	5	6	7	8	9	10	11	12	13
N. I. L.	Ala.	Arlz.	Col.	Conn.	D. C.	Fla.	Ida.	Ill.	Kan.	Ky.	Md.	Mass.	Mich.
106	5056	3409	4569	4276	1410	3033	3563	105	4645	1977	125	123	108
107	5058	3410	4570	4277	1411	3034	3564	106	4646	1978	126	124	109
108	5059	3411	4571	4278	1412	3035	3565	107	4647	1979	127	125	110
109	5060	3412	4572	4279	1413	3036	3566	108	4648	1980	128	126	111
110	5060	3413	4573	4280	1414	3036	3567	109	4649	1981	129	127	112
111	5060	3414	4574	4281	1415	3036	3568	110	4650	1982	130	128	113
112	5061	3415	4575	4282	1416	3037	3569	111	4651	1983	131	129	114
113	5062	3416	4576	4283	1417	3038	3570	112	4652	1984	132	130	115
114	5063	3417	4577	4284	1418	3039	3571	113	4653	1985	133	131	116
115	5064	3418	4578	4285	1419	3039	3572	114	4654	1986	134	132	117
116	5065	3419	4579	4286	1420	3039	3573	115	4655	1987	135	133	118
117	5066	3420	4580	4287	1421	3040	3574	116	4656	1988	136	134	119
118	5067	3421	4581	4288	1422	3041	3575	117	4657	1989	137	135	120
119	5068	3422	4582	4289	1423	3042	3576	118	4658	1890	138	136	121
120	5069	3423	4683	4290	1424	3042	3577	119	4659	1891	139	137	122
121	5070	3424	4584	4291	1425	3043	3578	120	4660	1892	140	138	123
122	5071	3425	4585	4292	1426	3044	3579	121	4661	1893	141	139	124
123	5072	3426	4586	4293	1427	3045	3580	122	4662	1894	142	140	125
124	5073	3427	4587	4294	1428	3046	3581	123	4663	1895	143	141	126
125	5074	3428	4588	4295	1429	3046	3582	124	4664	1896	144	142	127
126	5075	3429	4589	4296	1430	3047	3583	125	4665	1826	145	143	128
127	5076	3430	4590	4297	1431	3047	3584	126	4666	1827	146	144	129
128	5077	3431	4591	4298	1432	3047	3585	127	4667	1828	147	145	130
129	5078	3432	4592	4299	1433	3048	3586	128	4668	1829	148	146	131
130	5079	3433	4593	4300	1434	3049	3587	129	4669	1830	149	147	132
131	5080	3434	4594	4301	1435	3050	3588	130	4670	1831	150	148	133
132	5081	3435	4595	4302	1436	3051	3589	131	4671	1832	151	149	134
133	5082	3436	4596	4303	1437	3051	3590	132	4672	1833	152	150	135
134	5083	3437	4597	4304	1438	3051	3591	133	4673	1834	153	151	136
135	5084	3438	4598	4305	1439	3052	3592	134	4674	1835	154	152	137
136	5085	3439	4599	4306	1440	3053	3593	135	4675	1836	155	153	138
137	5086	3440	4600	4307	1441	3054	3594	...	4676	1837	156	154	139
138	5087	3441	4601	4308	1442	3055	3595	136	4677	1838	157	155	140
139	5088	3442	4602	4309	1443	3056	3596	138	4678	1839	158	156	141
140	5089	3443	4603	4310	1444	3056	3597	139	4679	1840	159	157	142
141	5090	3444	4604	4311	1445	3056	3598	140	4680	1841	160	158	143
142	5091	3445	4605	4312	1446	3057	3599	141	4681	1842	161	159	144
143	5092	3446	4606	4313	1447	3058	3600	142	4682	1843	162	160	145

X	14	15	16	17	18	19	20	21	22	23	24	25	26
N.I.L.	Mon.	Neb.	N. H.	N. Y.	N. C.	N. D.	Okl.	Ohio	Ore.	R.I.	Tenn.	Utah	Wis.
106	5954	105	106	177	2256	6408	106	3174x	4508	112	106	1658	1678-36
107	5955	106	107	178	2257	6409	107	3174y	4509	113	107	1659	1678-37
108	5956	107	108	179	2258	6410	108	3174z	4510	114	108	1660	1678-38
109	5957	108	109	180	2259	6411	109	3175	4511	115	109	1661	1678-39
110	5958	109	110	181	2260	6412	110	3175a	4512	116	110	1662	1678-40
111	5959	110	111	182	2261	6413	111	3175b	4513	117	111	1663	1678-41
112	5960	111	112	183	2262	6414	112	3175c	4514	118	112	1664	1678-42
113	5961	112	113	184	2263	6415	113	3175d	4515	119	113	1665	1678-43
114	5962	113	114	185	2264	6416	114	3175e	4516	120	114	1665x	1678-44
115	5963	114	115	186	2265	6417	115	3175f	4517	121	115	1665x1	1678-45
116	5964	115	116	187	2266	6418	116	3175g	4518	122	116	1665x2	1678-46
117	5965	116	117	188	2267	6419	117	3175h	4519	123	117	1665x3	1678-47
118	5966	117	118	189	2268	6420	118	3175i	4520	124	118	1665x4	1678-48
119	5967	118	119	200	2269	6421	119	3175j	4521	125	119	1665x5	1679
120	5968	119	120	201	2270	6422	120	3175k	4522	126	120	1665x6	1679-1
121	5969	120	121	202	2271	6423	121	3175 l	4523	127	121	1665x7	1679-2
122	5970	121	122	203	2272	6424	122	3175m	4524	128	122	1665x8	1679-3
123	5971	122	123	204	2273	6425	123	3175n	4525	129	123	1665x9	1679-4
124	5972	123	124	205	2274	6426	124	3175o	4526	130	124	1665x10	1679-5
125	5973	124	125	206	2275	6427	125	3175p	4527	131	125	1665x11	1679-6
126	5974	125	126	210	2276	6428	126	3175q	4528	132	126	1664x12	1680
127	5975	126	127	211	2277	6429	127	3175r	4529	133	127	1665x13	1680a
128	5976	127	128	212	2278	6430	128	3175s	4530	134	128	1665x14	1680b
129	5977	128	129	213	2279	6431	129	3175t	4531	135	129	1665x15	1680c
130	5978	129	130	214	2280	6432	130	3175u	4532	136	130	1665x16	1680d
131	5979	130	131	215	2281	6433	131	3175v	4533	137	131	1665x17	1680e
132	5980	131	132	220	2282	6434	132	3175w	4534	138	132	1665x18	1680f
133	5981	132	133	221	2283	6435	133	3175x	4535	139	133	1665x19	1680g
134	5982	133	134	222	2284	6436	134	3175v	4536	140	134	1665x20	1680h
135	5983	134	135	223	2285	6437	135	3175z	4537	141	135	1665x21	1680i
136	5984	135	136	224	2286	6438	136	3176	4538	142	136	1665x22	1680j
137	5985	136	137	225	2287	6439	137	3176a	4539	143	137	1665x23	1680k
138	5986	137	138	226	2288	6440	138	3176b	4540	144	138	1665x24	1680 l
139	5987	138	139	227	2289	6441	139	3176c	4541	145	139	1665x25	1680m
140	5988	139	140	228	2290	6442	140	3176d	4542	146	140	1665x26	1680n
141	5989	140	141	229	2291	6443	141	3176e	4543	147	141	1665x27	1680o
142	5990	141	142	230	2292	6444	142	3176f	4544	148	142	1665x28	1680p
143	5991	142	143	240	2293	6445	143	3176g	4545	149	143	1665x29	1681

X N. I. L.	1 Ala.	2 Ariz.	3 Col.	4 Conn.	5 D. C.	6 Fla.	7 Ida.	8 Ill.	9 Kan.	10 Ky.	11 Md.	12 Mass.	13 Mich.
144	5093	3447	4607	4314	1448	3059	3601	143	4683	1844	163	161	146
145	5094	3448	4608	4315	1449	3060	3602	144	4684	1845	164	162	147
146	5094	3449	4609	4316	1450	3061	3603	145	4685	1846	165	163	148
147	5095	3450	4610	4317	1451	3062	3604	146	4686	1847	166	164	149
148	5095	3451	4611	4318	1452	3062	3605	147	4687	1848	167	165	150
149	5097	3452	4612	4319	1453	3063	3606	148	4688	1849	168	166	151
150	5098	3453	4613	4320	1454	3063	3607	149	4689	1850	169	167	152
151	5099	3454	4614	4321	1455	3064	3608	150	4690	1851	170	168	153
152	5100	3455	4615	4322	1456	3065	3609	151	4691	1875	171	169	154
153	5101	3456	4616	4323	1457	3066	3610	152	4692	1876	172	170	155
154	5102	3457	4617	4324	1458	3066	3611	153	4693	1877	173	171	156
155	5103	3458	4618	4325	1459	3067	3612	154	4694	1878	174	172	157
156	5104	3459	4619	4326	1460	3067	3613	155	4695	1879	175	173	158
157	5105	3460	4620	4327	1461	3068	3614	156	4696	1880	176	174	159
158	5106	3461	4621	4328	1462	3069	3615	157	4697	1881	177	175	160
159	5107	3462	4622	4329	1463	3070	3616	158	4698	1882	178	176	161
160	5108	3463	4623	4330	1464	3071	3517	159	4699	1883	179	177	162
161	5109	3464	4624	4331	1465	3073	3618	160	4700	1852	180	178	163
162	5110	3465	4625	4332	1466	3074	3619	161	4701	1853	181	179	164
163	5111	3466	4626	4333	1467	3075	3620	162	4702	1854	182	180	165
164	5112	3467	4627	4334	1468	3076	3621	163	4703	1855	183	181	166
165	5113	3468	4628	4335	1469	3076	3622	164	4704	1856	184	182	167
166	5114	3469	4629	4336	1470	3077	3623	165	4705	1857	185	183	168
167	5115	3470	4630	4337	1471	3078	3624	166	4706	1858	186	184	169
168	5116	3471	4631	4338	1472	3079	3625	167	4707	1859	187	185	170
169	5117	3472	4632	4339	1473	3080	3626	168	4708	1860	188	186	171
170	5118	3473	4633	4340	1474	3081	3627	169	4709	1861	189	187	172
171	5119	3474	4634	4341	1475	3082	3628	170	4710	1868	190	188	173
172	5120	3475	4635	4342	1476	3082	3629	171	4711	1869	191	189	174
173	5120	3476	4636	4343	1477	3083	3630	172	4712	1870	192	190	175
174	5121	3477	4637	4344	1478	3084	3631	173	4713	1871	193	191	176
175	5122	3478	4638	4345	1479	3085	3632	174	4714	1872	194	192	177
176	5123	3479	4639	4346	1480	3086	3633	175	4715	1873	195	193	178
177	5124	3480	4640	4347	1481	3086	3634	176	4716	1874	196	194	179
178	5125	3481	4641	4348	1482	3087	3635	177	4717	1862	197	195	180
179	5126	3482	4642	4349	1483	3088	3636	178	4718	1863	198	196	181
180	5127	3483	4643	4350	1484	3089	3637	179	4719	1864	199	197	182

X N.I.L.	14 Mon.	15 Neb.	16 N. H.	17 N. Y.	18 N. O.	19 N. D.	20 Okl.	21 Ohio	22 Ore.	23 R. I.	24 Tenn.	25 Utah	26 Wis.
144	5992	143	144	241	2294	6446	144	3176h	4546	150	144	1665x30	1681-1
145	5993	144	145	242	2295	6447	145	3176i	4547	151	145	1665x31	1681-2
146	5994	145	146	243	2296	6448	146	3176j	4548	152	146	1665x32	1681-3
147	5995	146	147	244	2297	6449	147	3176k	4549	153	147	1665x33	1681-4
148	5996	147	148	245	2298	6450	148	3176 l	4550	154	148	1665x34	1681-5
149	5997	148	149	246	2299	6451	149	3176m	4551	155	149	1665x35	1681-6
150	5998	149	150	247	2300	6452	150	3176n	4552	156	150	1665x36	1681-7
151	5999	150	151	248	2301	6453	151	3176o	4553	157	151	1665x37	1681-8
152	6000	151	152	260	2302	6454	152	3176p	4554	158	152	1665x38	1681-9
153	6001	152	153	261	2303	6455	153	3176q	4555	159	153	1665x39	1681-10
154	6002	153	154	262	2304	6456	154	3176r	4556	160	154	1665x40	1681-11
155	6003	154	155	263	2305	6457	155	3176s	4557	161	155	1665x41	1681-12
156	6004	155	156	264	2306	6458	156	3176t	4558	162	156	1665x42	1681-13
157	6005	156	157	265	2307	6459	157	3176u	4559	163	157	1665x43	1681-14
158	6006	157	158	266	2308	6460	158	3176v	4560	164	158	1665x44	1681-15
159	6007	158	159	267	2309	6461	159	3176w	4561	165	159	1665x45	1681-16
160	6008	159	160	268	2310	6462	160	3176x	4562	166	160	1665x46	1681-17
161	6009	160	161	280	2311	6463	161	3176y	4563	167	161	1665x47	1681-18
162	6010	161	162	281	2312	6464	162	3176z	4564	168	162	1665x48	1681-19
163	6011	162	163	282	2313	6465	163	3177	4565	169	163	1665x49	1681-20
164	6012	163	164	283	2314	6466	164	3177a	4566	170	164	1665x50	1681-21
165	6013	164	165	284	2315	6467	165	3177b	4567	171	165	1665x51	1681-22
166	6014	165	166	285	2316	6468	166	3177c	4568	172	166	1665x52	1681-23
167	6015	166	167	286	2317	6469	167	3177d	4569	173	167	1665x53	1681-24
168	6016	167	168	287	2318	6470	168	3177e	4570	174	168	1665x54	1681-25
169	6017	168	169	288	2319	6471	169	3177f	4571	175	169	1665x55	1681-26
170	6018	169	170	289	2320	6472	170	3177g	4572	176	170	1665x56	1681-27
171	6019	170	171	300	2321	6473	171	3177h	4573	177	171	1665x57	1681-28
172	6020	171	172	301	2322	6474	172	3177i	4574	178	172	1665x58	1681-29
173	6021	172	173	302	2323	6475	173	3177j	4575	179	173	1665x59	1681-30
174	6022	173	174	303	2324	6476	174	3177k	4576	180	174	1665x60	1681-31
175	6023	174	175	304	2325	6477	175	3177 l	4577	181	175	1665x61	1681-32
176	6024	175	176	305	2326	6478	176	3177m	4578	182	176	1665x62	1681-33
177	6025	176	177	306	2327	6479	177	3177n	4579	183	177	1665x63	1681-34
178	6026	177	178	310	2328	6480	178	3177o	4580	184	178	1665x64	1681-35
179	6027	178	179	311	2329	6481	179	3177p	4581	185	179	1665x65	1681-36
180	6028	179	180	312	2330	6482	180	3177q	4582	186	180	1665x66	1681-37

X N. I. L.	1 Ala.	2 Ariz.	3 Col.	4 Conn.	5 D. C.	6 Fla.	7 Ida.	8 Ill.	9 Kan.	10 Ky.	11 Md.	12 Mass.	13 Mich.
181	5128	3484	4644	4351	1485	3090	3638	180	4720	1865	200	198	183
182	5129	3485	4645	4352	1486	3091	3639	181	4721	1866	201	199	184
183	5130	3486	4646	4353	1487	3092	3640	182	4722	1867	202	200	185
184	5031	3487	4647	4354	1488	3093	3641	183	4723	2009	203	201	186
185	5032	3487	4648	4355	1489	3094	3642	184	4724	2010	204	202	187
186	5033	3487	4649	4356	1490	3095	3643	185	4725	2011	205	203	188
187	5034	3487	4650	4357	1491	3096	3644	186	4726	2012	206	204	189
188	5035	3487	4651	4358	1492	3097	3645	187	4727	2013	207	205	190
189	5036	3487	4652	4359	1493	3098	3646	188	4728	2014	208	206	191
190	5037	....	4653	....	....	2934	3647	189	4533	....	13	...	1
191	5038	3487	4654	4170	1304	2934	3648	190	4534	1820	14	207	2
192	5039	3488	4655	4170	1304	2934	3649	191	4535	1821	15	208	2
193	5040	3489	4656	4170	1304	2934	3650	192	4536	1822	16	209	2
194	5041	3490	4657	4170	1304	2934	3651	193	4537	1823	17	210	2
195	5042	....	4658	4170	1304	....	3652	194	4538	1824	18	211	2
196	5043	3491	4659	4170	1304	2934	3653	195	4539	....	19	212	2
197	....	....	....	....	....	....	....	196	....	....	19	...	...
198	....	....	....	....	....	....	....	...	....	....	...	...	...

(X) In the following States, the numbering of the sections (in some cases the sub-sections) is the same as that of the commissioners' draft in the first column:

Iowa.—Code Supl. (1907), Tit. XV., sec. 3060a.

Louisiana.—Laws of 1904, Act. 64.

Missouri.—Laws of 1905, page 243; Annot. Sts. (1906), ch. 5, sec. 463.

Nevada.—Laws of 1907, ch. 62.

New Jersey.—Laws of 1902, ch. 184.

New Mexico.—Laws of 1907, ch. 83.

Pennsylvania.—Laws of 1901, page 194.

Virginia.—Laws of 1897-8, ch. 866; Code (1904), ch. 133a, sec. 2841a.

Washington.—Laws of 1899, ch. 149.

West Virginia.—Acts of 1907, ch. 81.

Wyoming.—Laws of 1905, ch. 43.

Hawaii.—Laws of 1907, ch. 89.

(1) Code 1907, ch. 115.

(2) R. S. 1901, Tit. XLIX.

(3) R. S. 1908, ch. XCV.

(4) G. S. 1902, Tit. 33, ch. 234.

(5) Code 1902, ch. XLVI.

(6) G. S. 1906, Tit. 5, ch. 2.

(7) Rev. Codes, 1908, Tit. 13.

X	14	15	16	17	18	19	20	21	22	23	24	25	26
N.I.L.	Mon.	Neb.	N. H.	N. Y.	N. C.	N. D.	Okl.	Ohio	Ore.	R. I.	Tenn.	Utah	Wis.
181	6029	180	181	313	2331	6483	181	3177r	4583	187	181	1665x67	1681-38
182	6030	181	182	314	2332	6484	182	3177s	4584	188	182	1665x68	1681-39
183	6031	182	183	315	2333	6485	183	3177t	4585	189	183	1665x69	1681-40
184	6032	183	184	320	2334	6486	184	3177u	4586	190	184	1665x70	1684
185	6033	184	185	321	2335	6487	185	3177v	4587	191	185	1665x71	1684-1
186	6034	185	186	322	2336	6488	186	3177w	4588	192	186	1665x72	1684-2
187	6035	185	187	323	2337	6489	187	3177x	4589	193	187	1665x73	1684-3
188	6036	187	188	324	2338	6490	188	3177y	4590	194	188	1665x74	1684-4
189	6037	188	189	325	2339	6491	189	3177z	4591	195	189	1665x75	1684-5
190	5482	....	....	1	....	6492	I	....	4592	...	....	1665x76	....
191	5843	189	190	2	2340	6493	I	3178	4592	1	Secs. 190-196 of N. I. L. Gen'l Introd. not numbered.	1665x77	1675
192	5844	190	191	3	2342	6494	I	3178a	4592	2		1665x78	1675
193	5845	191	192	4	2343	6495	I	3178b	4592	3		1665x79	1675
194	5846	192	193	5	....	6496	I	3178c	4592	4		1665x80	1675
195	5847	193	194	6	2345	6497	I	3178d	4593	5		1665x81	1675
196	5848	194	195	7	2344	6498	I	3178e	4594	6	Secs. 190-196 of N. I. L. Gen'l Introd. not numbered.	1665x82	1675
197	....	197	196	....	....	....	190	....	....	...		....	1684-7
198	....	198	196	....	....	....	...	....	....	...		....	....

- (8) Laws of 1907, page 403.
 (9) G. S. 1905, ch. 70.
 (10) Sts. (1909), Art. 9.
 (11) Pub. Gen. Laws 1904, Art. 13.
 (12) R. L. 1902, ch. 73.
 (13) Pub. Acts, 1905, page 389.
 (14) Civ. Code, 1907, Tit. XV.
 (15) Comp. Sts. 1907, ch. 41.
 (16) Laws of 1909, ch. 123.
 (17) Consol. Laws, ch. XXXVIII.
 (18) R. S. 1908, ch. 54.
 (19) Rev. Codes, 1905, ch. 90.
 (20) Laws of 1909, ch. XXIV.
 (21) Anno. Sts. 1787-1908, Tit. 1, Div. 2, ch. 2.
 (22) Anno. Codes and Sts. 1902, Tit. XXXVIII.
 (23) Gen. Laws 1909, Tit. XIX.
 (24) Code Supl. 1897-1903.
 (25) Comp. Sts. 1907, Tit. 53.
 (26) Sts. Supl. 1899-1906, ch. 78.

ARRANGEMENT

The arrangement of the Negotiable Instruments Law herein, with the annotation thereof, is as follows:

FIRST. The text of each section of the Negotiable Instruments Law, as recommended by the Commissioners on Uniform Legislation. (See Preface to first edition.)

SECOND. The changes, if any, made in the section in the various States adopting the Law.

THIRD. A brief summary of the criticisms and comments, if any, upon the section by Professor Ames, Judge Brewster and Mr. McKeehan. (See articles in full, *infra*, pp. 162-297.)

FOURTH. The American cases decided under the section with comments.

(The cases cited generally without abstracts are either cases in which the court made no reference to the Negotiable Instruments Law (although the Law was in force at the time), or cases abstracted under other sections to which reference is made, or cases which involve no question of sufficient novelty or importance or in which the application of the Law is too plain to justify an abstract. Such cases are placed at the head of the cases under the respective sections, and are cited for the sake of completeness. A few of the cases in which the Law was not cited have, however, been abstracted because of their special interest or novelty, the fact that the Law was not mentioned being noted in the abstract. Cases which have been decided since the Law went into effect, but to which it was not applicable because the instruments were issued before the Law was adopted, are not cited. The abbreviation "S. C. sec.," at the end of the citation of some of the cases, means that an abstract of the same case upon another point will be found under the section indicated by the numeral following the abbreviation.)

FIFTH. The English cases decided under the corresponding section of the Bills of Exchange Act. (It would require too much space to include in the abstracts of these cases the text of the sections of the Bills of Exchange Act therein involved. Reference should therefore be made to the corresponding sections of the Negotiable Instruments Law, as shown in Appendix II, Table II.)

SIXTH. Annotations in foot notes, showing the differences in substance and sometimes in form between the Bills of Exchange Act and the Negotiable Instruments Law.

ABBREVIATIONS. B. E. A.: Bills of Exchange Act of England.
N. I. L.: Negotiable Instruments Law.

The Negotiable Instruments Law.⁽¹⁾

A GENERAL ACT RELATING TO NEGOTIABLE INSTRUMENTS (BEING AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER STATES ON THAT SUBJECT).²

TITLE I.

NEGOTIABLE INSTRUMENTS IN GENERAL.

ARTICLE I.

FORM AND INTERPRETATION.

SECTION 1. Be it enacted, etc., An instrument³ to be negotiable must conform to the following requirements:—

¹ This Act does not affect the right of parties to non-negotiable instruments. *Westberg v. Chicago Lumber Co.*, 117 Wis. 589, 94 N. W. 572.

² For cases rightly favoring a liberal construction of the law in the interest of uniformity, see *Brewster v. Shrader*, 26 Misc. R. 480, 57 N. Y. Supp. 906; *Payne v. Zell*, 98 Va. 249, 36 S. E. 379; *B. & O. Ry. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837; *Trustees of American Bank v. McComb*, 105 Va. 473, 54 S. E. 14; *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490; *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451.

Contra, and construing the law strictly in favor of the pre-existing law of the State, are *Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. Supp. 504; *Roseman v. Mahoney*, 86 App. Div. 377, 83 N. Y. Supp. 749; *Hover v. Magley*, 48 Misc. Rep. 430, 96 N. Y. Supp. 925; *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682.

³ The Illinois act interpolates "payable in money" after "instrument" because in that State instruments payable in goods have always been negotiable.

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money; (*a*)
3. Must be payable on demand, or at a fixed or determinable future time; (*b*)
4. Must be payable to order or to bearer;⁴(*c*) and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.(*d*)

The Michigan Act uses, "Certain sum" instead of "sum certain."

The Arizona, Idaho, Iowa and North Carolina Acts read, in subsection 4: "Must be payable to the order of a specified person, or to bearer," but "specified person" is surplusage. See Section 8.

The Wisconsin Act adds: "But no order drawn upon or accepted by the treasurer of any county, town, city, village or school district, whether drawn by any officer thereof or any other person, and no obligation nor instrument made by any such corporation or any officer thereof, unless expressly authorized by law to be made negotiable, shall be, or shall be deemed to be, negotiable according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading and railroad receipts upon the face of which the words 'not negotiable' shall not be plainly written, printed or stamped, shall be negotiable as provided in section 1676 of the Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; Borough of Montvale v. People's Bank, 74 N. J. Law, 464, 67 Atl. 67, S. C. sec. 56; Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185, S. C. sec. 5-1.

(*a*) A promissory note in due form is negotiable, although it is secured by a mortgage which provides that on default in interest or failure to comply with any of the conditions of the mortgage, the whole shall, at the option of the mortgagee, become

⁴"A negotiable bill may be payable either to order or to bearer." B. E. A. s. 8 (2).

due and payable. The court also cited sections 2-3 and 4-4. The latter, a new section composed of the words "at a fixed period after date or sight, though payable before then on a contingency," and of the last paragraph of section 4-3 N. I. L. Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003.

A draft in the ordinary form contained the following words after the sum: "400 c A. R. L. No. 3362 via A. R. L. B. L. direct." These words, under the custom and usage of business, notified the payee that a certain number of cases had been shipped by a certain line, and that the bill of lading went direct to the payee. Held, that the draft was an unconditional order and negotiable. Waddell v. Hanover Nat. Bank, 48 Misc. R. 578, 97 N. Y. S. 305.

An order to pay A, or order, "\$300.00, or what may be due on my deposit book," is conditional. National Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428.

Bonds otherwise negotiable in form issued by a joint-stock association are none the less negotiable because of a provision therein making them payable solely out of assets assigned to a trustee under a trust deed or out of other assets of the association, and exonerating the shareholders of the association from the individual liability to which they would otherwise be subject; and negotiability of the bonds renders the coupons negotiable.

Nor does the fact that the deed of trust securing the bonds reserves to a certain portion of the bondholders the right to waive default in payment of coupons and postpone the time of their payment, affect the negotiability of the coupons; the reservation relating to procedure under the trust deed, and not preventing enforcement of a bondholder's general remedies at law for the collection of the obligation. Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108. See 19 Harv. Law Rev. 616, for criticism of this case in the Appellate Division.

A stipulation on the back of a note that it was secured by a mortgage, and that the payee agreed to look to mortgage security for its payment, became a part of the note, and rendered it non-negotiable. Allison v. Hollembeak, 138 Iowa, 479, 114 N. W. 1059.

An instrument drawn by a special agent of a foreign insurance company directing the drawee (the company) "on acceptance" to pay to the order of the payee a sum of money in satisfaction of all claims under a certain policy is not payable unconditionally, and is not negotiable, and neither the drawee nor the drawer can be held thereon. Berenson v. London & Lancashire Fire Ins. Co., 201 Mass. 172 87 N. E. 687.

(b) Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108, S. C. sec. 1-2; Union Stockyards Nat. Bank v. Bolan, 14 Idaho, 87, 93 Pac. 508, S. C. sec. 184.

An instrument in the following form :

"\$250. Aug. 14, 1907. Mr. W. T. will please pay to R. J. T., or order, two hundred and fifty dollars and charge to my account. Due Oct. 1st, J. R." is payable Oct. 1st, and is a bill of exchange. *Torpey v. Tebo*, 184 Mass. 307, 68 N. E. 223.

A note expressed to be "payed when we get it from the brewery after date," is not negotiable. *Wray v. Miller* (Misc. Rep.), 120 N. Y. Supp. 787.

(c) *Wettlaufer v. Baxter* (Ky.), 125 S. W. 741, S. C. sec. 9-5.

A certificate of deposit payable to "A or his assigns" is not negotiable under the N. I. L. nor under the law merchant. *Zander v. N. Y. Security & Trust Co.*, 39 Misc. R. 98, 78 N. Y. Supp. 900, affirmed 81 App. Div. 635, 81 N. Y. Supp. 1151. But a certificate of deposit payable to the order of the payee is negotiable. *Dickey v. Adler* (Mo. App.), 127 S. W. 593.

A promissory note not payable to order or to bearer is not negotiable. A former statute, otherwise providing, is impliedly repealed by the N. I. L. *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424, S. C. sec. 123. See also, as to first point, *Fulton v. Varney*, 117 App. Div. 572, 575, 102 N. Y. Supp. 608; *Westberg v. Chicago Lumber Co.*, 117 Wis. 589, 94 N. W. 572, S. C. sec. 137.

Defendant made a note on a printed form containing the words "or order," and in the lower left-hand corner the words "not transferable" in a small, contracted hand. When plaintiff acquired the note he did not notice these words. The court found that the defendant was not negligent in not writing the words "not transferable" more plainly. *Held*, that the written portions of a note prevail over the printed, and that the note was not negotiable. *Tanners' Nat. Bank v. Lacs* (App. Div.), 120 N. Y. Supp. 669. The N. I. L. was not cited in this case.

(d) *Rinker v. Lauer* (Idaho), 88 Pac. 1057.

SEC. 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid—

1. With interest; (a) or
2. By stated installments; or
3. By stated installments, with a provision that upon default in payment of any installment or of interest¹ the whole shall become due; (b) or

¹ The words "or of interest" are omitted in the English Act. B. E. A. s. 9 (1) (c).

4. With exchange, whether at a fixed rate or at the current rate;² or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.³(c)

The Idaho, Iowa and North Carolina Acts omit, "Or of interest" in Subsection 3.

The Nebraska Act adds: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment on an instrument made in this State any sum for attorney's fees or other costs not allowable in other cases."

The North Carolina Act adds (Section 197, Pells Revisal, Section 2346): "Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this chapter; but the mention of such provisions in such instruments shall not affect the other terms of such instruments or the negotiability thereof."

(a) *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109.

(b) *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, S. C. sec. 1-2; *Mackintosh v. Gibbs* (N. J.) 74 Atl. 708, S. C. sec. 66.

(c) *Seemle*, the attorney's fee is due if the unpaid note is placed in the hands of an attorney for collection, although no suit is brought. A stipulation in a mortgage securing the note for fees in case of suit on the mortgage is cumulative and not restrictive of the provision of the note. *Morrison v. Ornbaun*, 30 Mont. 111, 75 Pac. 953.

A provision in a promissory note for attorney's fees "if collected by attorney, or if suit is brought on this note," is a promise to pay attorney's fees for collection only after dishonor, and does not impair the negotiability of the note. *First Natl. Bank of Shawano v. Miller*, 139 Wis. 126, 120 N. W. 820, S. C. sec. 104.

A provision in a note for an attorney's fee, but leaving blank the amount thereof, amounts to a promise to pay a reasonable sum as an attorney's fee, and does not render the note non-negotiable. Where plaintiff employed an attorney, it is

² "According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill." B. E. A. s. 9 (1) (d).

³ Not in B. E. A.

sufficient to show what is a reasonable fee, and it is not necessary to prove an express agreement as to fees, or that plaintiff paid the attorney before suit. *McCormick v. Swem* (Utah) 102 Pac. 626.

Under the law of Maryland a clause in a note agreeing to pay five per cent. commission for collecting it, if not paid when due, was construed to mean such commissions to the extent of five per centum in case the holder reasonably had to incur liability for and pay such commissions, but not otherwise. *Chestertown Bank v. Walker*, 163 Fed. 510, 90 C. C. A. 140. The *N. I. L.* was not cited in this case.

SEC. 3. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with—

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; (a) or
2. A statement of the transaction which gives rise to the instrument. (b)

But an order or promise to pay out of a particular fund is not unconditional.

(a) An order drawn by the X Company directing payment of a certain sum, "on account of contract between you (the drawee) and the X Company" held negotiable, the words "on account of" not having the same effect as "out of the proceeds of." *First Nat. Bank v. Lightner*, 74 Kans. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353.

An order to pay on or before a fixed day and "charge the same to the \$1,800 payment," is not conditional. *Shepard v. Abbott*, 179 Mass. 300, 60 N. E. 782.

A bill of exchange is not made non-negotiable because it contains the words "charge to my account and credit according to a registered letter I have addressed to you." These words do not mean according to the conditions mentioned in the letter, but merely charge my account and credit according to the letter. *In re Boyse*, 33 Ch. Div. 612.

(b) AMES: If taken literally, this subsection is mischievous because it might make negotiable a note with the words "given as collateral security for A's debt to the payee," contrary to several decisions. And *quaere* whether it would not apply to a note with a statement that it is given for a chattel, which is to be the property of the payee until the note is paid, as to the negotiability of which there is a conflict.

BREWSTER: Admits that the provision was intended to apply to a "chattel note."

McKEEHAN: Sees no danger that courts will construe the subsection as covering a note given as collateral. He also doubts its application to the so-called "chattel notes," and regards it as only a codification of the rule, that an indication of the nature of the transaction does not make the instrument conditional.

Fulton v. Varney, 117 App. Div. 572, 102 N. Y. Supp. 608, S. C. sec. 1-4; National Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428, S. C. sec. 1-2; Bank of Sampson v. Hatcher, 151 N. C. 359, 66 S. E. 308.

A promissory note given for a chattel, and stipulating that the title to the chattel shall remain in the vendor-payee until the note is paid, is not conditional, and the maker is liable thereon although the chattel was destroyed before the maturity of the note. The N. I. L. was not mentioned. Whitlock v. Auburn Lumber Co. 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214. See *infra*, pp. 165-166, 182-183, 224-227.

A note payable to the order of X which contains a provision that it is given subject to the approval of X for property received of X, and that the title to said property shall remain in X until the note is paid, is not negotiable. Worden Grocer Co. v. Blanding (Mich.), 126 N. W. 212. The court did not cite the N. I. L., and followed the case of Sloan v. McCarty, 134 Mass. 245, upon this disputed question.

An instrument contained an order for specified goods, and at the end of it was a promissory note in negotiable form, the signatures to which were the only signatures to the instrument. The note was capable of being detached, and was detached and transferred by defendant. Held, that the instrument as originally written was not a promissory note, that the detachment of the note part was a material alteration, and that defendant was guilty of forgery. State v. Mitton, 37 Mont. 366, 96 Pac. 926.

SEC. 4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable, (a)

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein;¹ (b) or

¹ Not in B. E. A.

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.²

The Wisconsin Act substitutes, for the last paragraph, the following: "4. At a fixed period after the date or sight, though payable before then on a contingency. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, except as herein provided."

(a) *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, S. C. sec. 1; *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383, S. C. secs. 7-1, 71, 73; *Union Stock Yards Nat. Bank v. Bolan*, 14 Idaho, 87, 93 Pac. 508, 125 Am. St. Rep. 146, S. C. sec. 184.

(b) *Torpey v. Tebo*, 184 Mass. 307, 68 N. E. 223, S. C. sec. 1-3; *Wray v. Miller* (Misc. Rep.), 120 N. Y. Supp. 787, S. C. sec. 1-3.

Notes, payable at a certain time, but secured by a mortgage executed as part of the same transaction, and reciting that the whole debt shall be due in case of sale or removal of the property by the mortgagor without the consent of the mortgagee, or in case the mortgagee deems himself insecure, are uncertain as to time and amount of payment and are therefore not negotiable. *Iowa Nat. Bank v. Carter* (Iowa), 123 N. W. 237, S. C. secs. 25, 56.

SEC. 5. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which—

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity;³ (a) or

² "An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect." B. E. A. s. 11 (2).

³ A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof." B. E. A. s. 83 (3). The B. E. A. appears to make no similar provision as to bills.

2. Authorizes a confession of judgment if the instrument be not paid at maturity;²(b) or
3. Waives the benefit of any law intended for the advantage or protection of the obligor;³ or
4. Gives the holder an election to require something to be done in lieu of payment of money.²

But nothing in this section shall validate any provision or stipulation otherwise illegal.

The North Carolina Act qualifies subsection 2 (see *supra*, under section 2).

The Illinois Act adds the words "under this Act," at the end of the first sentence, and omits the words "if the instrument be not paid at maturity," in subsection 2.

The Kentucky Act omits subsection 3.

The Wisconsin Act adds to the last paragraph: "Or authorize the waiver of exemptions from execution."

(a) A note, reciting that the title to property for which it is given shall remain in the payee, and that he shall have the right to declare the money due and take possession of the property whenever he may deem himself insecure, "even before the maturity of the note," is not negotiable. *Kimpton v. Studebaker Bros. Co.*, 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185.

(b) A note which contains a provision authorizing a confession of judgment at any time thereafter, whether due or not, is not negotiable. *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 91 N. W. 678. Nor is a note containing an authority to confess judgment "as of any term." *Milton Nat. Bank v. Beaver*, 25 Pa. Superior Ct. 494.

SEC. 6. The validity and negotiable character⁴ of an instrument are not affected by the fact that—

1. It is not dated; (a) or

² Not in B. E. A.

³ Not in B. E. A., except that section 16 (2) provides that the drawer of a bill and any indorser may insert therein an express stipulation "waiving as regards himself some or all of the holder's duties."

⁴ The English Act omits the words "and negotiable character." B. E. A. s. 3 (4).

2. Does not specify the value given, or that any value has been given therefor; ^(b) or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; ^{2(c)} or
5. Designates a particular kind of current money in which payment is to be made. ^{3(d)}

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.³

The Illinois Act begins subsection 5 with the words, "Is payable in currency or current funds: or," and omits the last paragraph of said subsection.

(a) *Church v. Stevens*, 56 Misc. R. 572, 107 N. Y. Supp. 310; *Bank of Houston v. Day* (Mo. App.), 122 S. W. 756, S. C. sec. 13.

(b) *McLeod v. Hunter*, 29 Misc. R. 558, 61 N. Y. Supp. 73, S. C. sec. 24.

(c) *St. Paul's Episcopal Church v. Fields*, 81 Conn. 670, 72 Atl. 145; *Arnd v. Heckert*, 108 Md. 300, 70 Atl. 416.

(d) A check payable "in current funds" is not payable in money and is not negotiable. *Dille v. White*, 132 Iowa, 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510, following former Iowa cases, but not citing the N. I. L. S. C. sec. 65.

SEC. 7. An instrument is payable on demand—

1. Where it is expressed to be payable on demand, or at sight, or on presentation; ^(a) or
2. In which no time for payment is expressed. ^(b)

² "In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal. But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal." B. E. A. s. 91 (2).

³ Not in B. E. A.

Where an instrument is issued,¹ accepted, or indorsed when overdue, it is, as regards the person so issuing,¹ accepting, or indorsing it, payable on demand.

(a) A note payable on demand after date is a demand note, and presentment need not be made the day after date, but only within a reasonable time to hold an indorser. *Hardon v. Dixon*, 77 App. Div. 241, 78 N. Y. S. 106, holding that the Statute of Limitations did not begin to run on such a note until the day after its date, said to have no application. *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. S. 383, S. C. secs. 71, 73.

Defendant indorsed a note which was signed by the maker, but was blank as to date, time of payment and payee. The note was delivered to the plaintiff for value by the maker, who told the plaintiff to fill in the dates at any time she wanted money, because he did not know when he would be able to pay. The maker disappeared nearly three years later, and three months thereafter plaintiff dated the note the day of its delivery to her, and made it payable the day it was filled in, and presented it the same day. *Held*, that the defendant was liable, that the note was not a demand note requiring presentment within a reasonable time after its issue to charge the indorser. But no interest was recoverable, because when a note does not call for interest and there is no blank in which to add the words "with interest," the holder is not authorized to add such words. *Usef v. Herzenstein*, 65 Misc. Rep. 45, 119 N. Y. Supp. 290.

(b) *Didato v. Coniglio*, 50 Misc. R. 280, 100 N. Y. Supp. 466, S. C. sec. 17-5; *McLeod v. Hunter*, 29 Misc. R. 558, 61 N. Y. Supp. 73, S. C. sec. 24.

SEC. 8. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order.¹ It may be drawn payable to the order of—

1. A payee who is not maker, drawer, or drawee;²(a) or

¹ The words "issued" and "issuing" are omitted in the English Act. B. E. A. s. 10 (2).

¹ "A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable." B. E. A. s. 8 (4). See also *infra*, p. 130, n. 1, and p. 150 n. 34.

² Not in B. E. A.

2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly;³ or
5. One or some of several payees;³ or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.⁴

The Illinois Act interpolates after subsection 6 the following: "7. An instrument payable to the estate of a deceased person shall be deemed payable to the order of the administrator or executor of his estate."

(a) "Pay to — order" means "pay to my order," and a bill so reading and indorsed by the drawer is a valid bill of exchange. *Chamberlain v. Young* [1893], 2 Q. B. 206.

SEC. 9. The instrument is payable to bearer—

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer;¹ or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable;²(a) or
4. When the name of the payee does not purport to be the name of any person;³(b) or
5. When the only or last indorsement is an indorsement in blank.(c)

³ "A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees." B. E. A. s. 7 (2).

⁴ "When the bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty." B. E. A. s. 7 (1).

¹ Not in B. E. A. Chalmers (6th ed. 25) says "a bill payable 'to J. C. or bearer' is of course payable to bearer."

² "Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." B. E. A. s. 7 (3).

³ Not in B. E. A.

The Illinois Act substitutes for subsection 3 the following: "3. When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in it," and for subsection 5, the following: "5. When, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee."

(a) AMES: Section 9-3 ignores the tenor of the instrument. By this section and section 16, if a note payable to a fictitious payee is stolen from the maker and indorsed by the thief in the name of the payee, the maker would be liable to a holder in due course. The section should be made to read, "If a bill be drawn, or a note made, payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in the instrument, and if such bill or note be indorsed by the drawer or maker in the name of the nominal payee, the instrument will have the same effect as a bill or note payable to the order of, and endorsed by the drawer or maker respectively."

As a matter of actual experience the maker of an instrument, with a known fictitious payee, does not intend it to be payable to bearer, but always indorses it in the fictitious name before issuing it.

BREWSTER: The case of the stolen note put by Dean Ames would be rare. The section seems to cover common cases, such as notes payable to unincorporated associations, estates of deceased persons and the like. But upon the reply of Professor Ames, that if the section applies to the case of a note payable to a joint stock company incorporated, or to a partnership which is an incorporated association, or to the estate of a deceased person, the provision is still more mischievous, Judge Brewster seems to claim that he used the case merely as an illustration of a common case, without saying that the section applied to such a case.

McKEEHAN: There are strong arguments in favor of Professor Ames' view. But the section codifies the law since *Minet v. Gibson*, in 1791. Technically it is wrong to permit the transfer without indorsement of an instrument which appears on its face to require an indorsement for a valid transfer, but there is no great danger in the case of an unindorsed stolen note payable to a fictitious payee, because no one would discount it. If indorsed by the thief to a holder in due course, still the maker's conduct made the fraud possible, and he should bear the loss. An interpretation which would make payable to bearer notes payable to unincorporated associations or to the estates of deceased persons would be opposed to reason and authority, and would work much harm. The section does not suggest such a change in the law.

A requested a bank to draw a draft to the order of C Bros., an existing firm who were ignorant of the transaction. A indorsed

the draft in the name of C Bros., and the indorsee collected it from the drawee. Held, that the knowledge of the drawer of the fictitious or non-existing character of the payee controls, not the knowledge of the person at whose request the draft is drawn. That the draft was not payable to bearer and that the drawee could recover the money from the indorsee. *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829; *Jordan Marsh Co. v. Nat. Shawmut Bank*, 201 Mass. 397, 87 N. E. 740 accord. See also cases cited under section 23.

A clerk had a power of attorney to draw checks on his employer's bank account. The clerk fraudulently drew checks to X, an existing person, but who had no interest in the checks and was not intended by the clerk to receive them. The clerk indorsed the name of X and negotiated the checks for his own purposes, and the drawee bank paid them in good faith. Held, that the payee was a fictitious person within the section, that the checks were payable to bearer and that the payment by the bank was rightful. *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 70 Atl. 876, S. C. sec. 124

The name of the drawer was forged to checks made payable to real persons. It did not appear who the forger was, but he knew that the payees would never have any interest in the checks. The drawee bank paid the checks to defendant, a holder in due course, on the forged indorsement of the payee. Held, that the payees were fictitious, that the checks were payable to bearer, and that the drawer could not recover the money from defendant. *Trust Company of America v. Hamilton Bank*, 127 App. Div. 515, 112 N. Y. Supp. 84.

An instrument knowingly made payable to the order of a fictitious or non-existing person is negotiable without indorsement, but to recover upon the instrument as payable to bearer, it must be shown that the maker had knowledge of the fiction, and if the plaintiff declares only upon the instrument as payable to order, it is not necessary to decide whether there is evidence of such knowledge, as the issue is not open. *Boles v. Harding*, 201 Mass. 103, 87 N. E. 481. This case is meagerly reported, but it seems to hold that the plaintiff, having declared that the instrument was indorsed by the payee, must prove it or fail, which is a harsh rule, as he may not be aware of the fictitious character of the payee before the trial.

In reading the following English cases it must be remembered that the Bills of Exchange Act treats an instrument, payable to a fictitious or non-existing person, as payable to bearer, without regard to the knowledge of the person making it so payable. See *supra*, p. 12, n. 2.

A bill payable to a real person not intended by the drawer to have any interest in it is payable to a fictitious person, and is to be treated as payable to bearer, and the acceptor's ignorance of the fiction is immaterial. *Bank of England v. Vagliano* [1891], A. C. 107.

The drawer's ignorance that the payee is non-existing is also immaterial. *Clutton v. Attenborough* [1897], A. C. 90. But if

the payee is a real person intended by the drawer to be the payee, he is not a fictitious person, and the drawer is not liable to one claiming under a forged indorsement of the payee's name, although the payee really had no interest in the instrument. *Bank of England v. Vagliano* and *Clutton v. Attenborough*, distinguished. *Vinden v. Hughes* [1905], 1 K. B. 795; *North & South Wales Bank v. Macbeth* [1908], App. Cas. 137.

(b) In an action against the drawer of a check payable to cash, the production of the check is *prima facie* evidence of ownership. *Cleary v. DeBeck Co.*, 54 Misc. R. 537, 104 N. Y. Supp. 831.

(c) AMES: The language of subsection 5 is not well chosen. 1. Taken literally a note payable to the order of B and bearing the anomalous blank indorsement of C, would be payable to bearer, which is, of course, an absurdity. 2. It means that an instrument expressly payable to bearer so continues, although afterward specially indorsed; but that if an instrument payable to order has become payable to bearer by being indorsed in blank, it ceases to be payable to bearer, if afterwards indorsed specially, an illogical and undesirable distinction. 3. If an instrument, indorsed in blank, and subsequently indorsed specially is transferred by the special indorsee by delivery merely, the transferee can sue prior parties only in the name of his assignor. But as owner, though not according to this subsection, holder, he ought to have the right to strike out the special indorsement and sue as bearer.

But it should be provided that, though payable to bearer, a subsequent special indorsement carries notice that the property in the instrument was once vested in the special indorsee, so that, in the absence of an indorsement or assignment by him, all subsequent holders will hold for his benefit.

BREWSTER: Professor Ames' first objection is untenable; his construction is impossible. As to his third objection, section 40 gives the transferee the right to sue in his own name. And section 48 gives the right to strike out any indorsements not necessary to title.

McKEEHAN: Professor Ames' second objection is not tenable. The distinction noted is logical and in accordance with the mercantile view. As to his third objection, the transferee, by delivery from the special indorsee of an instrument payable to order and indorsed in blank, should not have the right to strike out indorsements necessary to his title. Under *Smith v. Clarke*, 2 Peake, 225, the holder had the right to strike out all indorsements after the first blank indorsement. But section 9-5 was adopted expressly to do away with this doctrine. Section 48 gives the right to strike out only indorsements not necessary to the holder's title, and in the case put the indorsement to the special indorsee is necessary to his title, and therefore can not be stricken out. As to Judge Brewster's statement, that section 40 gives the transferee by de-

livery from the special indorsee the right to sue in his own name, if this is so, then *Smith v. Clarke* is still in force, and section 9-5 which was inserted to overthrow that case, is a nullity. See *infra*, under section 40, for further discussion.

A promissory note indorsed in blank by the payee is payable to bearer. *Mass. Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959, S. C. secs. 16, 56, 124, 191; *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655 (a check), S. C. sec. 56.

The indorsement in blank of a non-negotiable promissory note does not make it negotiable, and the indorser is liable only as an assignor. *Wettlaufer v. Baxter* (Ky.), 125 S. W. 741.

SEC. 10. The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.¹

Idaho, Iowa and Wyoming Acts insert the word "negotiable" between the words "The" and "instrument."

The Wisconsin Act (Nos. 1675-10) adds "Memoranda upon the face or back of the instrument, whether signed or not, material to the contract, if made at the time of delivery, are part of the instrument and parol evidence is admissible to show the circumstances under which they were made."

A certificate of deposit reciting that "X has deposited in the Y bank three thousand dollars to the credit of himself, payable in current funds on return of this certificate properly indorsed on July 1, 1909" is a negotiable instrument under the N. I. L. *Forrest v. Safety Banking & Trust Co.* (E. D. Pa.), 174 Fed. 345.

Sec. 11. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

SEC. 12. The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose.²(a)

¹ Not in B. E. A.

² "A bill is not invalid by reason only that it is antedated or postdated, or that it bears date on a Sunday." B. E. A. s. 13 (2).

The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.³

The Missouri Act by an evident clerical error reads "valid" instead of "invalid."

Bank of Houston v. Day (Mo. App.), 122 S. W. 756, S. C. sec. 13.

(a) An indorsee of a postdated check is not put upon inquiry merely because of its negotiation prior to its date. *Albert v. Hoffman*, 64 Misc. Rep. 87; 117 N. Y. Supp. 1043, S. C. sec. 25.

A post-dated check is not invalid, and may be properly stamped as a bill payable on demand. *Royal Bank v. Tottenham*, [1894] 2 Q. B. 715; *Hitchcock v. Edwards*, 60 L. T. Rep. 636.

A post-dated check is not irregular within sec. 29 (1) so as to charge the holder with equities. *Hitchcock v. Edwards*, 60 L. T. Rep. 636.

SEC. 13. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. (a) The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.⁴

(a) An undated note, payable four months after date, was delivered to the payee by an accommodation indorser on December 1st. The payee, without authority, filled in the date December 30th. *Held*, that in the absence of other authority the payee could only fill in the blank with the date of issue and that the indorser was discharged. *Bank of Houston v. Day*, (Mo. App.), 122 S. W. 756.

³ Not in B. E. A.

⁴ "Provided that (1) where the holder in good faith and by mistake inserts a wrong date and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date." B. E. A. s. 12, second paragraph.

SEC. 14. Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein.(a) And a signature on a blank⁵ paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount.⁶ In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time.(b) But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.(c)

The Illinois Act interpolates the words "issued or" before "negotiated" in the last sentence.

The Wisconsin Act inserts "prior to negotiation" before the words "by filling."

The Wisconsin Act also omits the words "*prima facie*" in the seventh line of the section.

The Kentucky Act uses "negotiable" in the last paragraph instead of "negotiated," an evident clerical error.

Rodgers v. Baker (App. Div.), 122 N. Y. Supp. 91.

(a) The word "material" in this section is not synonymous with "necessary" so as to restrict the right of filling a blank to something essential to a complete negotiable instrument. Therefore the name of a place may be written after delivery in a blank space after the word "at" and the instrument will not be thereby avoided in the hands of a holder in due course. Johnston v. Hoover, 139 Iowa, 143; 117 N. W. 277.

⁵ The English Act interpolates the word "stamped." B. E. A. s. 20 (1).

⁶ B. E. A. s. 20 (1) provides that the blank signature shall operate as *prima facie* authority to fill up "for any amount the stamp will cover, using the signature for that of the drawer, acceptor, or an indorser."

Where the maker of a note signed and delivered it, leaving a blank after the amount between the words "at" and "value received," the payee or any subsequent holder was authorized to fill the blank with a place of payment either within or without the State, and such act was not an alteration avoiding the note.

Diamond Distilleries Co. v. Gott (Ky.), 126 S. W. 131.

Where a note is drawn payable with interest at the rate of — per cent., it draws interest at the legal rate, although the blank is not filled. Hornstein v. Cifuno (Neb.), 125 N. W. 136. The N. I. L. was not cited in this case.

(b) The burden is on the plaintiff, a party prior to the completion of an instrument signed in blank, to prove that the blanks were filled up within a reasonable time. From October to the following June 9 is, if unexplained, more than a reasonable time. Madden v. Gaston, 121 N. Y. Supp. 951, *semble*, S. C. sec. 16.

Defendant signed a note in blank on the statement that it was to be used to borrow money for a co-defendant who was jointly liable with the plaintiff to a bank. The note was filled up in the presence of the plaintiffs, who were made payees, and delivered to them, and they then paid the co-defendant's share of the debt to the bank. Held, that the note was filled up in accordance with the authority given, that the payees were holders for value and could recover on the note. Hermann's Ex'r. v. Gregory (Ky.), 115 S. W. 809, S. C. sec. 25.

(c) First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4; Stanley v. Davis, 32 Ky. Law R. 1135; 107 S. W. 773.

The purchaser of a negotiable instrument with an unfilled blank is put upon inquiry as to the authority of the person intrusted with the incomplete instrument. Sec. 14 N. I. L. changes the law. Guerrant v. Guerrant, 7 Va. L. Reg. 639 (payee); Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646; 97 Am. St. Rep. 426 (amount), S. C. sec. 52; Huntington Nat. Bank v. Breslin (Neb.), 128 N. W. 659.

Defendant signed a note in blank and gave it to A with the authority to fill it up not in excess of \$200. A filled it up for \$2,000 payable to plaintiff, and delivered it to him in payment of a debt. Held, that defendant was not liable to plaintiff on the note, although plaintiff was ignorant of A's abuse of his authority. Plaintiff was a holder, but not a holder in due course to whom the instrument had been "negotiated." Herdman v. Wheeler, [1902] 1 K. B. 361, *infra*, followed, Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 112 N. W. 807; 13 L. R. A. (N. S.) 490. But see Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, holding that the payee of a completed check received in payment of a debt due from the remitter of the check is a holder in due course, under sec. 52, without regard to the question whether it has been "negotiated" within sec. 14. See statement of this case *infra*, sec. 52. See also Lloyd's Bank v. Cooke, [1907] 1 K.

B. 794, *infra*, in which *Herdman v. Wheeler* is criticised by Fletcher Moulton, L. J. "

A note signed in blank was filed up in excess of the authorized amount, the name of C inserted as payee, and the completed note delivered to C, who took in good faith and for value. *Held*, that this was not a negotiation to a holder in due course within the meaning of the proviso to sec. 20 (2) (sec. 14, N. I. L.), and C could not recover. *Herdman v. Wheeler*, [1902] 1 K. B. 361. (See criticism in 15 *Harvard Law Rev.* 579.)

But where defendant signed a note as maker in blank with authority to another to fill it up with a certain sum payable to plaintiff, and it was filled up for a larger sum and delivered to plaintiff, who had no notice of the fraud, *held*, that independently of section 20 (2), (sec. 14, N. I. L.), defendant was estopped to deny the validity of the note as against the plaintiff. *Herdman v. Wheeler* distinguished, *Lloyd's Bank v. Cooke* [1907], 1 K. B. 794.

The payee in such a case is a holder in due course, per Fletcher Moulton, L. J. *Ib.* 805, 809. Where, however, the defendant signed blank forms of promissory notes and left them with his attorney, but with no authority to complete and issue them until so instructed by telegram or letter, and the attorney without further instructions filled up the forms, making plaintiff payee, and plaintiff bought the notes *bona fide* for value, but although he knew that they had been signed in blank, and were held by the attorney under a power of attorney, made no inquiries as to its terms. *Held*, that as defendant had intrusted the blank forms to his attorney as custodian merely, and had not given him authority to issue them as negotiable instruments he was not estopped to deny the validity of the notes. Also per Fletcher Moulton, L. J., that plaintiff was bound to inquire into the attorney's authority. *Lloyd's Bank v. Cooke* distinguished. *Smith v. Prosser*, [1907] 2 K. B. 735. See also *Glenie v. Bruce Smith* [1908] 1 K. B. 263 *infra*, sec. 64-2.

SEC. 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.⁷

Polizzotto v. People's Bank (La.), 51 So. 843.

SEC. 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the

⁷ Not in B. E. A.

instrument for the purpose of giving effect thereto.⁸(a) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.(b) And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional⁹ delivery by him is presumed until the contrary is proved.

The North Carolina Act omits the word "accepting" in the second sentence.

The Kansas Act omits the third sentence.

AMES: The doctrine of section 16, that one who has signed a negotiable instrument complete on its face is liable thereon to a holder in due course, although it was never delivered by him, but lost by him, or stolen from him, or even from some one else after his death, is somewhat startling at first. But it should commend itself on reflection. It has been adopted, after much consideration, in Germany.

The Bürgerliches Gesetzbuch, section 794, referred to by Professor Ames, applies to other instruments payable to bearer, but not to bills and notes, since such instruments payable to bearer are not authorized by the German code.

Section 16 (N. I. L.) goes beyond the German law, for it applies even to the case of an undelivered bill or note made payable to

⁸ B. E. A. s. 21 (1) interpolates here the additional provision, "Provided that where an acceptance is written on a bill and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable."

⁹ The English Act reads "unconditional" instead of "intentional." B. E. A. s. 21 (3).

order, stolen by the payee, indorsed by him and negotiated to a holder in due course, thus codifying such extreme cases as *Clarke v. Johnson*, 54 Ill. 296 and *Shipley v. Carroll*, 45 Ill. 285. Ed.

(a) A bill of exchange was indorsed and handed to the payee's bankers to be discounted. Some days later the bankers credited the payee's account with the bill. Held, that the property in the bill did not pass to the bankers until it was discounted by them. *Dawson v. Isle*, [1906] 1 Ch. 633.

(b) *Colborn v. Arbecam*, 54 Misc. R. 623, 104 N. Y. S. 986; *Moak v. Stevens*, 45 Misc. R. 147, 91 N. Y. Supp. 903; *Viets v. Silver*, 15 N. Dak. 51, 106 N. W. 35; *Borough of Montvale v. Peoples' Bank*, 74 N. J. Law, 464, 67 Atl. 67, S. C. sec. 56; *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886, S. C. sec. 64-1, 109; *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923.

A holder in due course can recover upon a negotiable note indorsed in blank by the payee and stolen from him. *Mass. Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959 (action against payee as indorser), S. C. secs. 9-5, 56, 124, 191; *Greaser v. Sugarman*, 37 Misc. R. 799, 76 N. Y. Supp. 922 (action against maker-payee); *Poess v. Twelfth Ward Bank*, 43 Misc. R. 45, 86 N. Y. Supp. 857 (check), *semble*, S. C. secs. 51, 187.

Evidence of a contemporaneous oral agreement is admissible as against parties not holders in due course to show that the instrument was not to take effect until some condition was performed. *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192, S. C. secs. 52-3, 54, 55; see also *Key v. Usher*, 30 Ky. L. Rep. 667, 99 S. W. 324, in which, however, the N. I. L. was not cited.

Evidence of a contemporaneous verbal agreement that the payee would renew the note twice for a similar period, and at the end of that time would accept a re-transfer of stock, for which the note was given, at the maker's election, was admissible to show that the note was never delivered with intent that it should constitute a completed instrument in *presenti*. *Sed quære*, whether this was not a case of condition subsequent which could not be shown by parol to defeat the note? See dissenting opinions. *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841, S. C. sec. 52-3.

Under the last clause of section 16 and section 14, the burden is on the defendant to show the agreement under which a negotiable instrument signed in blank was delivered and that the terms have been violated. *Madden v. Gaston* (Misc. Rep.) 121 N. Y. Supp. 951, S. C. sec. 14.

A bill of exchange payable to the order of the drawer does not come into existence until it is delivered as well as indorsed by the payee. *Stouffer v. Curtis*, 198 Mass. 560, 85 N. E. 180.

In *Sheffer v. Fleischer*, 158 Mich. 270, 122 N. W. 543, holding, that no delivery is a defense even as against a holder in due course, the date of the notes does not appear but they must have been executed before the N. I. L. was adopted in that State (June 1905) otherwise the decision is erroneous.

SEC. 17. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:—

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;¹⁰
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof; (a)
3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;¹¹
4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;¹¹
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;¹¹(b)
6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;¹²(c)
7. Where an instrument containing the words, "I promise to pay," is signed by two or more

¹⁰ The last clause of 1 is not in the corresponding section of the English Act. B. E. A. s. 9 (2).

¹¹ Not in B. E. A.

¹² "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." B. E. A. s. 56.

persons, they are deemed to be jointly and severally liable thereon.¹³(d)

The North Carolina Act originally adopted section 17 in full but the revisal of 1908 (section 2341) omits subsection 2.

The Wisconsin Act adds: "8. Where several writings are executed at or about the same time, as parts of the same transactions, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

(a) *Bank of Houston v. Day* (Mo. App.) 122 S. W. 756, S. C. sec. 13.

(b) An instrument in the following form:

"\$1000. New York 190 .

Pay to the order of Rosario Didato

Value received and charge on account to 38 Stanton Street.
Lansa Rosalia."

may be declared upon as a promissory note. *Didato v. Coniglio*, 50 Misc. R. 280, 100 N. Y. Supp. 466.

(c) This provision applies only to cases of doubt arising out of the location of the signature. Therefore one who signed in the place of the maker's name is not an indorser. *Germania Natl. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574, S. C. secs. 63, 64.

(d) *Ullery v. Brohm*, 20 Colo. App. 389, 79 Pac. 180.

SEC. 18. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.¹⁴

Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064; *N. Y. Life Ins. Co. v. Martindale*, 75 Kans. 142, 88 Pac. 559, 121 Am. St. Rep. 362.

¹³ "Where a note runs 'I promise to pay,' and is signed by two or more persons, it is deemed to be their joint and several note." B. E. A. s. 85 (2). No similar provision as to a bill appears in B. E. A.

¹⁴ The English Act adds: "The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm." B. E. A. s. 23 (2).

This section has no application to an oral guaranty by the payee upon transferring a note for value without indorsement, the guaranty being an original and absolute obligation to which the note is collateral. *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. 999, S. C. sec. 49. Such oral guaranty is not within the Statute of Frauds, *Ib.*

SEC. 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.¹⁵

The Kentucky Act substitutes: "The signature of any party may be made by an agent duly authorized in writing."

When an instrument payable to X, was indorsed "X by Y with power of attorney" plaintiff, in order to prove his title, must show the authority of the agent to indorse. *Scotland County Nat. Bank v. Hohn* (Mo. App.), 125 S. W. 539, S. C. sec. 30.

SEC. 20. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized;¹⁶(a) but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.¹⁷(b)

The Virginia Act inserts after "capacity" in line four, the words "without disclosing his principal."

¹⁵ The last sentence of this section is omitted in the English Act. B. E. A. s. 91 (1).

¹⁶ The words "if he was duly authorized" are not in the English Act. B. E. A. s. 26 (1).

¹⁷ The English Act adds: "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted." B. E. A. s. 26 (2).

AMES: Under this section, an agent signing without authority of the principal is, by implication, liable on the instrument. This is unjust and a departure from the English Act and the almost uniform current of judicial decisions by which the agent is liable only on his implied warranty of authority. According to this rule the measure of damages would be nominal, if the principal should happen to be bankrupt; whereas under section 20 it would be the amount of the instrument.

BREWSTER: There is no injustice. The agent should know whether he has authority. He should be liable as the maker of the note. Such is the rule of the German Code.

McKEEHAN. The rule of section 20, though difficult to justify on principles of contract, has important practical advantages. It increases negotiability and enables plaintiff to prove with ease and certainty the amount to be recovered.

(a) *Germania Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574, S. C. secs. 17-6, 63, 64.

A trustee under a will, without authority to borrow, executed a note as trustee as evidence of a loan, and applied the money to the use of the trust. Held, that, regardless of the form of the note, he was individually liable and that the estate was not. *Tuttle v. First Nat. Bank of Greenfield*, 187 Mass. 533, 73 N. E. 560, 105 Am. St. Rep. 420.

A note was signed "The X Co. A Pres., B Sec'y." In an action by the payee against A and B, *held*, that evidence was admissible to show that the note was the obligation of the company and not of A and B. If no representations were made to the payee, his understanding could not debar the defendants from showing their intention in signing. Former cases in the State were cited, but the N. I. L. was not. *Western Grocer Co. v. Lackman*, 75 Kans. 34, 88 Pac. 527.

A note reading "We promise to pay" and signed "The X Co, J. L. M.," held ambiguous and that evidence was admissible to show that the note was that of the company and accepted as such by the payee. The N. I. L. was not cited. *Dunbar Co. v. Martin*, 53 Misc. R. 312, 102 N. Y. Supp. 91.

A note reading "six months after demand I promise to pay" and signed "J. H. S. Laundry and Dye Works, J. H. S. Managing Director" is the note of the company and J. H. S. is not personally liable. *Chapman v. Smethurst* [1909], 1 K. B. 927.

A check drawn in favor of plaintiff was stamped near the top with the words "B. Marcus & Co. (Limited)" and signed by the two defendants as follows: "B. Marcus, Director, S. H. Davids, Director, — Secretary," the space for the signature of the secretary being left blank. The name of the company appeared only at the top of the check. Held, that the defendants were personally liable on the check. *Landes v. Marcus and Davids* (K. B. Div. Mar. 31, 1909), 25 T. L. Rep. 478.

(b) A note was written on a lithographed receipt form, with the name of a corporation at the head, and the impressed seal of the company upon the paper, but not referred to in the note, and the defendants added the word "president" and "secretary" respectively to their signatures. Held, not such disclosure of a principal as will exempt the signers from personal liability. *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811, *sub nom.* *Daniel v. Buttner*.

Where defendant signed a note as a "trustee," held, that as to holders in due course the principal must be disclosed on the face of the note in order to relieve defendant of personal liability (*semble*), but as between defendant and the payee the disclosure might be made *aliunde*, and is a question of fact for the jury. *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738.

If the payee knows the nature and object of the trust, and that the maker of the note was acting in his capacity as trustee, the maker is not individually liable to the payee, although none of such information appears on the note. *Kerby v. Ruegamer*, 107 App. Div. 491, 95 N. Y. Supp. 408.

SEC. 21. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.(a)

(a) The manager of a company in order to obtain a guarantee for the company's business, without authority, gave a note signed "for myself and in representation of the company." This was not necessary or in the ordinary course of the company's business. Held, that the company was not liable on the note. *Re Cunningham & Co.*, 36 Ch. D. 532.

An agent of a company drew a check "per proc.," in excess of his authority. The company is not liable on the check to one who cashed it in good faith, but must account for any money which came into its possession and was employed for its benefit. *Reid v. Rigby & Co.* [1894] 2 Q. B. 40. See also *Bissell v. Fox*, 53 L. T. R. 193, S. C. *infra*, p. 309.

Directors of a company which had no power to accept bills, accepted a bill "per proc." the company. Held, that they are personally liable in an action for false representations. *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360.

Where an agent accepts or indorses "per proc.," the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority. But when the agent has the authority to do the act in question, his abuse of such authority will not affect a *bona fide* holder for value. *Bryant, Powis & Bryant v. Quebec Bank*, [1893] A. C. 170, 179.

SEC. 22. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.¹⁸(a)

AMES: The language of section 22, unlike that of the English Act, is ambiguous and may mean that the transfer of the infant is irrevocable, which would be an unjust change in the law where the indorsee knows of the infancy.

BREWSTER: The language used in section 22 means the same thing as that of the English Act.

McKEEHAN: The section makes no change in the law. An infant's indorsement always "passes the property." The section does not touch the question of his right to revest the title in himself. The English Act provides the same thing as section 20.

(a) *Oppenheim v. Simon Reigel Cigar Co.*, 90 N. Y. Supp. 355, S. C. sec. 29 (indorsement by a corporation); *Willard v. Crook*, 21 App. D. C. 237 (indorsement by a corporation), S. C. sec. 66.

Under the Infants' Relief Act, 1874, and Bills of Exchange Act, sec. 22, an infant can not be held on a bill of exchange, even though it was given for necessities and is in the hands of a holder in due course. *In re Soltykoff* [1891], 1 Q. B. 413.

SEC. 23. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.¹⁹(a)

¹⁸ "Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill and to enforce it against any other party thereto." B. E. A. s. 22 (2).

¹⁹ The English Act adds: "Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery." B. E. A. s. 24.

The Illinois Act omits the words "of the person whose signature it purports to be."

(a) *Casey v. Pilkington*, 83 N. Y. App. Div. 91; *Blum v. Whipple*, 194 Mass. 253, 80 N. E. 501, 13 L. R. A. (N. S.) 211, 120 Am. St. Rep. 553; *Oriental Bank v. Gallo*, 112 App. Div. 360, 98 N. Y. Supp. 561; *Lonier v. State Sav. Bank*, 149 Mich. 483, 112 N. W. 1119; *National City Bank v. Third National Bank*, 177 Fed. Rep. 136; *Warren v. Smith (Utah)*, 100 Pac. 1069; *State v. Corning Savings Bank*, 139 Iowa 338, 115 N. W. 937.

An agent having authority to indorse checks payable to his principal and to deposit them in a certain bank for collection, indorsed his principal's name and transferred the checks to a third person who deposited them in defendant's bank, which collected and paid the amount to such third person in good faith. Held, that the indorsement by the agent was not a forgery and the defendant was not liable to the principal for a conversion of the checks. *Salen v. Bank*, 110 App. Div. 636, 97 N. Y. Supp. 361.

Proof that one of several signatures to a note was forged or affixed without authority does not necessarily avoid the note as to those whose signatures are genuine; it clearly would not render the note unenforceable against parties who actively procured the forgery or acquiesced in it on full knowledge. But *semble* that if a party signed on the faith of a forged preceding signature, and believing that he was assuming a joint liability with the one whose signature was forged, he would not be liable to the payee. *Beem v. Farrell*, 135 Iowa 670, 113 N. W. 509. *Sed quare* as to the dictum on the latter point, which seems clearly wrong. See *Ames Cases on Suretyship*, 310, 311 n. 6.

A note signed by a firm name and made payable to the order of one of the members of the firm was, without the knowledge or consent of the payee, indorsed in the payee's name by another member of the firm, was discounted for the firm and the money placed to the credit of the firm. Held, that the payee was not liable as joint maker or as indorser. *Pettyjohn v. Natl. Exchange Bank*, 101 Va. 111, 43 S. E. 203.

A, fraudulently representing himself to be B, obtained a check payable to the order of B, who was known to the drawer to be an existing person. An indorsement of the check by A in the name of B passes no title under sec. 23, or at common law, and the drawer can recover from the drawee bank which paid the check. *Tolman v. American Exch. Bank*, 22 R. I. 462, 48 Atl. 480. *Sed quare?* The cases are overwhelmingly to the contrary as to the common law, and the cases cited by the court are not in point. And the contrary construction is put upon section 23 N. I. L. in *Hoffman v. American Exchange Bank*, 2 Neb. (unofficial), 217, 96 N. W. 112. The contrary result was also reached in *Jamieson v. Heim*, 43 Wash. 153, 86 Pac. 165, in *Heavy v. Commercial Nat. Bank*, 27 Utah 222, 75 Pac. 727, 101 Am. St. Rep. 966, and in *Central Nat. Bank v. Nat. Met. Bank (C. C. Dist. Col.)* 35 Wash. Law Rep. 621,

in which jurisdictions the N. I. L. was in force, although section 23 was not cited. For discussion of this subject by Professor Ames, Judge Brewster and Mr. McKeehan, see *infra*, pp. 216-218, 246-252.

A stranger, giving the name of J. C., attempted to negotiate to plaintiff bank a draft on a New York bank for \$500, payable to one J. C. Upon the refusal of the plaintiff, the defendant, although warned by plaintiff, bought the draft, indorsed it, left it with plaintiff for collection, was credited with the amount, and paid the stranger \$125. Plaintiff sent the draft to New York for collection, was advised that it had been paid, and so notified defendant, who thereupon bought of plaintiff a draft for \$375, payable to J. C., and sent it to him. Later plaintiff learned that the indorsement on the draft for \$500 was forged. A *bona fide* holder of the draft for \$375 sued plaintiff and recovered judgment (*Jamieson v. Heim*, 43 Wash. 153 *supra*), which plaintiff paid, and thereupon sued defendant for \$375. Held, that plaintiff could recover. The N. I. L. was not cited. *Heim v. Neubert*, 48 Wash. 587, 94 Pac. 104.

A bill payable to a real person not intended by the drawer to have any interest in it, is payable to a fictitious person, and is therefore to be treated as payable to bearer, under sec. 7, subs. 3, (*supra*, p. 12, n. 2), and payment of it in due course by the acceptor's banker is binding on the acceptor. *Bank of England v. Vagliano*, [1891] A. C. 107.

A check on a London bank drawn in Roumania was transferred by a forged indorsement in Austria, where such transfer gave a good title. Held, that the validity of the transfer is to be governed by the law of Austria, section 24 B. E. A. being only declaratory of English law and not controlling the general rule of international law. *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 677.

ARTICLE II.

CONSIDERATION.

SEC. 24. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration;²⁰ (a) and every person whose signature appears thereon to have become a party thereto for value.

(a) *Colborn v. Arbecam*, 54 Misc. R. 623, 104 N. Y. Supp. 986; *Karsch v. Pottier Co.*, 82 App. Div. 230, 81 N. Y. Supp. 782;

²⁰ Not in B. E. A., but section 30 (1) reads as follows: "Every party whose signature appears on the bill is *prima facie* deemed to have become a party thereto for value."

Black v. Bank of Westminster, 96 Md. 399, 54 Atl. 88, S. C. secs. 29, 56; Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. Supp. 1059, S. C. sec. 184; Moak v. Stevens, 45 Misc. R. 147, 91 N. Y. Supp. 903; Royal Bank v. Goldschmidt, 51 Misc. R. 622, 101 N. Y. Supp. 101, S. C. sec. 119; Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; Joveshof v. Rockey, 58 Misc. R. 559, 109 N. Y. Supp. 818; S. C. sec. 59; Zimbleman & Otis v. Finnegan (Iowa), 118 N. W. 312; Lynchburg Milling Co. v. Nat. Exch. Bank, 109 Va. 639, 64 S. E. 980; Hawkins v. Windhorst (Kan.) 108 Pac. 805; National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. secs. 28, 133.

This section has no application to non-negotiable instruments. And such instruments do not now import a consideration, the former statute importing a consideration having been repealed by the N. I. L. Deyo v. Thompson, 53 App. Div. 9, 65 N. Y. Supp. 459.

Where the maker pleads want of consideration, plaintiff (payee) may recover in the absence of evidence in support of the plea. But if defendant give evidence tending to show want of consideration the burden is on the plaintiff to show by a fair preponderance of evidence upon the whole case that there was consideration. Bringman v. Van Glahn, 71 App. Div. 537, 75 N. Y. Supp. 845, *semble*.

In an action against an indorser, defendant pleaded that he indorsed without consideration, and gave evidence to show that he indorsed without consideration for the accommodation of plaintiff. Held, that although the production of the note was *prima facie* evidence of consideration, the burden of proof was on the plaintiff throughout the trial. Lombard v. Byrne, 194 Mass. 236, 80 N. E. 489. The N. I. L. was not cited and the judgment rests on the prior law of the State, which, like that of the State of New York was contrary to the correct rule of pleading and to the rule of the majority of the States. Moreover the courts in the foregoing two cases seem also to have overlooked sec. 28 N. I. L., which makes absence of consideration "matter of defense" against any one not a holder in due course.

Where the defense is that a note was without valuable consideration, the plaintiff has the affirmative of the issue, and the burden of proof rests upon him at every step of the case to show a consideration by a preponderance of the whole evidence adduced at the trial. Ginn v. Dolan (Ohio), 90 N. E. 141. Section 28 was overlooked in this case also, and the N. I. L. was not cited.

As to the rule in an action by an indorsee, see Mitchell v. Baldwin, *infra*, sec. 59.

Directors of a bank upon examination of its loans found a note signed by the cashier and payable to defendant but unindorsed. The cashier stated that defendant had agreed to indorse the note, and, defendant having been called in, indorsed the note. Held, that defendant was liable although he received no consideration. Bank of Monticello v. Dooly, 113 Wis. 590, 89 N. W. 490.

This section does not validate a note made by a married woman for accommodation where a statute prohibits her from becoming a surety or agreeing to answer for the default or liability of any other person. *People's Nat. Bank v. Schepflin*, 73 N. J. Law 29, 62 Atl. 333.

The omission of the words "for value received" does not weaken the presumption of valuable consideration. *McLeod v. Hunter*, 29 Misc. R. 558, 61 N. Y. Supp. 73.

SEC. 25. Value is any consideration sufficient to support a simple contract. (a) An antecedent or pre-existing debt²¹ constitutes value; and is deemed such whether the instrument is payable on demand or at a future time. (b)

The Wisconsin Act interpolates "discharged, extinguished or extended" after the word "debt" in line 3 and adds to the section the following sentence: "But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value."

Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59; *Murchison Nat. Bank v. Dunn Co.*, 150 N. C. 683, 64 S. E. 885; *H. Scherer & Co. v. Everest*, 168 Fed. 822, 94 C. C. A. 346; *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, S. C. secs. 14, 52; *Pelton v. Spider Lake Co.*, 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963, S. C. sec. 56; *Russell Electric Co. v. Bassett*, 79 Conn. 709, 66 Atl. 531; *Allentown Natl. Bank v. Clay Co.*, 217 Pa. 128, 66 Atl. 252; *Black v. Bank of Westminster*, 96 Md. 399, 54 Atl. 88, S. C. secs. 29, 56; *Mohlman v. McKane*, 60 App. Div. 546, 69 N. Y. Supp. 1046, S. C. sec. 108; *Crawford Co. Bank v. Stegeman*, 137 Iowa 13, 114 N. W. 549; *Second Nat. Bank v. Werner* (N. D.), 126 N. W. 100.

(a) A sale of goods to the maker of a note is a consideration for the indorsement of a third person before the delivery of the note. *Mohlman v. McKane*, 60 App. Div. 546, 69 N. Y. Supp. 1046.

A bank receiving a certificate of deposit and crediting the same to the depositor, does not give value where the credit was not absolute but conditional upon the collection of the certificate. *Commercial Nat. Bank v. State Bank*, 132 Iowa 706, 109 N. W. 198.

A bank bought a note and credited the price to the seller's account which was afterwards sometimes overdrawn. The bank knew

²¹ "An antecedent debt or liability." B. E. A. s. 27 (1) (b).

of no defense to the note until after its maturity. *Held*, that the fact that at various times before maturity as well as at maturity and at the beginning of the action the seller had a balance in bank, did not prevent the bank from being a *bona fide* purchaser for value. *Northfield Natl. Bank v. Arndt*, 132 Wis. 383, 112 N. W. 451. See also cases under secs. 52-3.

In an exchange of checks each check is a consideration for the other; each is an independent obligation and not conditional on the payment of the other. Hence, one who *bona fide* gives his check for that of a third person without notice of the illegality of such check is not bound to stop payment of his own check upon receiving notice of the illegality of the check exchanged for his, and he may recover against the drawer of such check. *Matlock v. Scheuerman*, 51 Oregon 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747, S. C. secs. 53, 56, 186.

A note secured by mortgage was executed and delivered, the money to be advanced from time to time. *Held*, that there was a consideration for the note although the money was never advanced. *Marling v. FitzGerald*, 138 Wis. 93, 120 N. W. 388, S. C., 49, 58. The decision is equivalent to holding that a promise to pay money is a valuable consideration for a promissory note, which accords with the definition of value in section 25 which was, however, not cited by the court. See comment on this case, *infra*, sec. 49.

Defendant, by mistake, gave a check to the payee, who indorsed it to plaintiff as a loan. *Held*, that plaintiff was not a holder in due course, having given no value. *Rosenthal v. Parsont*, 110 N. Y. Supp. 223.

The payee of a note upon receiving it paid an indebtedness of the maker due to a third person. *Held*, that the payee was a holder for value. *Hermann's Ex'r v. Gregory* (Ky.), 115 S. W. 809, S. C. sec. 14.

A note made merely in renewal of a prior note which was without consideration is invalid for want of consideration. *Edwards v. Chancellor*, 52 J. P. 454.

Where the payee of a check deposits it with his bank, and is credited with the amount, the bank is a holder for value. *Royal Bank v. Tottenham*, [1894] 2 Q. B. 715, 717, 718. *Capital & Counties Bank v. Gordon*, [1903] A. C. 240, 245 *semble*. *A fortiori* if the amount is drawn out by the depositor. *National Bank v. Silke*, [1891] 1 Q. B. 435, 439.

(b) Payment or part payment of a pre-existing debt is value. *Bigelow Co. v. Automatic Gas Co.*, 56 Misc. R. 389, 107 N. Y. Supp. 894; *Wallebout Bank v. Peyton*, 123 App. Div. 727, 108 N. Y. Supp. 42; *Albert v. Hoffman*, 64 Misc. Rep. 87, 117 N. Y. Supp. 1043, S. C. sec. 12; *Mindlin v. Appelbaum*, 62 Misc. Rep. 300, 114 N. Y. Supp. 908.

An antecedent or pre-existing debt is value, even though the instrument is transferred merely as collateral security for such debt. *Brewster v. Shrader*, 26 Misc. R. 480, 57 N. Y. Supp. 606,

S. C. sec. 112; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; *Wilkins v. Usher*, 123 Ky. 696, 97 S. W. 37, S. C. sec. 52-2; *Citizens' Bank v. Bank of Waddy's Receiver*, 103 Ky. L. Rep. 249, 103 S. W. 249; *Brooks v. Sullivan*, 129 N. C. 190, 39 S. E. 822, *semble*; *Iowa Nat. Bank v. Carter* (Iowa), 123 N. W. 237, *semble*, S. C. secs. 4, 56; *Graham v. Smith*, 155 Mich. 65; 118 N. W. 726. *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1. See also *Trustees of American Bank v. McComb*, 105 Va. 473, 54 S. E. 14, S. C. secs. 52, 52-1; *contra*, *Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. Supp. 504; *Roseman v. Mahony*, 86 App. Div. 377, 83 N. Y. Supp. 749; *Hover v. Magley*, 48 Misc. R. 430, 96 N. Y. Supp. 925; *National Bank v. Foley*, 54 Misc. R. 126, 103 N. Y. Supp. 553, S. C. secs. 52-3, 59; *Gansevoort Bank v. Gilday*, 53 Misc. R. 107, 104 N. Y. Supp. 271; *Harris v. Fowler*, 59 Misc. Rep. 523, 110 N. Y. Supp. 987; *Bank of America v. Waydell*, 103 App. Div. 25, 33, 92 N. Y. Supp. 666, affirmed 187 N. Y. 115, 79 N. E. 857, but not passing on this point.

The narrow construction put upon section 25 by the inferior courts of New York, which, if sustained by the Court of Appeals, will destroy the uniformity of the law in this regard, has been criticised by Hon. Amasa M. Eaton, President of the Commissioners on Uniform Legislation in 27 Reports of American Bar Association 658. See also further review and criticism of New York cases by Mr. Eaton in 34 Reports of American Bar Association 1034.

In the case of *In re Hopper-Morgan Co.*, 154 Fed. Rep. 249, it was held that both under the former law of New York and under this section, an accommodation note, given without any restriction upon its use, may be transferred merely as collateral security for an antecedent debt so as to make the indorsee a holder for value. Also that the assumption of the obligation of presenting the note for payment and giving notice of dishonor to indorsers was giving value, following *Railroad Co. v. National Bank*, 102 U. S. 14, and declining to follow the above cited New York cases, because they were not decisions of the highest court of the State.

The surrender of a note and collateral and extinguishment of the debt whether before or after maturity is value. Section 25 was, however, not cited. *Ward v. City Trust Co.*, 117 App. Div. 130, 102 N. Y. Supp. 50. This case was reversed on another ground in 192 N. Y. 61, *infra*, sec. 56.

A promise to forbear suing on an antecedent debt is value. *Milius v. Kauffmann*, 104 App. Div. 442, 93 N. Y. Supp. 669.

The surrender of a non-negotiable note is sufficient consideration for a negotiable note. *Petrie v. Miller*, 57 App. Div. 17, 67 N. Y. Supp. 1042, affirmed 173 N. Y. 596 without report.

Where a bank took a note as collateral security for a note of another person, the bank became a holder for value. So also if the bank took the note in exchange for the note of such other person. *Campbell v. Fourth Natl. Bank* (Ky.), 126 S. W. 114, S. C. sec. 59.

Defendant signed a note for the accommodation of O to enable O to take up a forged note, which O had indorsed to plaintiff. *Held*, that defendant was liable whether O indorsed the forged note with knowledge of the forgery or not. *Jennings v. Law*, 199 Mass. 124, 85 N. E. 157.

Where one having possession of notes, indorsed by the payees, wrongfully pledged them by way of substitution for other collateral held by the pledgee for an antecedent debt, the pledgee became a holder for value. *Voss v. Chamberlain*, 139 Iowa 569, 117 N. W. 269.

SEC. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Black v. Bank of Westminster, 96 Md. 399, 54 Atl. 88, S. C. secs. 29, 56; *Petrie v. Miller*, 57 App. Div. 17, 67 N. Y. Supp. 1042, affirmed 173 N. Y. 596, S. C. sec. 25; *Hover v. Magley*, 48 Misc. R. 430, 96 N. Y. Supp. 925.

An allegation in an answer that the note was executed and indorsed without any consideration is insufficient, the allegation of the complaint that the payee indorsed and delivered the note for value before maturity having been admitted. *Rogers v. Morton*, 46 Misc. R. 494, 95 N. Y. Supp. 49, S. C. secs. 30, 52.

The holder of a note for \$2,000, surrendered it for a payment of \$500, and a new note for \$1,500 executed by the maker and indorsed by defendant. *Held*, that the holder of the new note was a holder for value. *Van Norden Trust Co. v. L. Rosenberg*, 62 Misc. R. 285, 114 N. Y. Supp. 1025.

SEC. 27. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822, S. C. sec. 25; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379, S. C. sec. 25; *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, S. C. sec. 52; *Rogers v. Morton*, 46 Misc. R. 494, 95 N. Y. Supp. 49, S. C. secs. 26, 30, 52; *Baßterman v. Butcher*, 95 App. Div. 213, 88 N. Y. Supp. 685; *Petrie v. Miller*, 57 App. Div. 17, 67 N. Y. Supp. 1042, affirmed 173 N. Y. 596, S. C. sec. 25; *Brown v. James (Neb.)*, 114 N. W. 531.

See *Redfern v. Rosenthal*, 86 L. T. Rep. 855. *infra*. sec. 52-2.

SEC. 28. Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.²²

Lynds v. Van Valkenburgh, 77 Kans. 24, 93 Pac. 615; *Padgett v. Lewis*, 54 Fla. 177, 45 So. 29; *Green v. Ostrander* (Mich.), 125 N. W. 735; *Joveshof v. Rockey*, 58 Misc. Rep. 559, 109 N. Y. Supp. 818, S. C. sec. 59.

One of two joint makers of a note can not testify that he signed it because two names were necessary and on condition that he was not to pay the note but that the other maker was to have the money and pay the note. *Rowe v. Bowman*, 183 Mass. 488, 67 N. E. 636, S. C. sec. 125.

A check was made by A to the order of B to be used to pay C for withdrawing a charge of rape against B, alleged to be a false charge, and to prevent his rearrest on said charge. The check was indorsed by B to C and by C to plaintiff, without consideration, and upon payment being stopped, plaintiff sued A. Held, that A could not defend on the ground of duress which was not exercised on him, but that he could defend on the ground of want of consideration. *Weiss v. Rieser*, 62 Misc. Rep. 292, 114 N. Y. Supp. 983.

In a suit between remote parties to a bill of exchange, as the payee or indorsee and the acceptor, to sustain the defense of no consideration, there must have been no consideration received by the defendant and plaintiff must have given no consideration. *National Park Bank v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. sec. 133. The N. I. L. was not cited on this point.

Sec. 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

The Illinois Act omits the words "without receiving value therefor" in line three and adds at the end of the section

²² Not in B. E. A.

“and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity.”

AMES: The clause “without receiving value therefor” is inaccurate and misleading. If A gives B \$10 to induce B to sign a note for \$1,000 for A’s accommodation, no one would doubt that B would be an accommodation party, yet if he is, the above clause is erroneous.

BREWSTER: The definition in section 29 is the same as in the cases, text books and law lexicons.

McKEEHAN: As stated by Mr. Arthur Cohen, “Without receiving value therefor” means without receiving value for the bill and not without receiving any consideration for lending his name. So B is an accommodation party if he received no value for the instrument, though he did receive \$10 for signing his name to it. [See *Morris County Brick Co. v. Austin*, *infra*, in which this construction is adopted.—Ed.]

Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66, 124; *Metropolitan Printing Co. v. Springer*, 90 N. Y. Supp. 376; *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, S. C. sec. 52; *White v. Savage*, 48 Oregon 604, 87 Pac. 1040; *In re Troy & Cohoes Shirt Co.*, 136 Fed. Rep. 420, S. C. sec. 56; *Hover v. Magley*, 48 Misc. R. 430, 96 N. Y. Supp. 925; *Willard v. Crook*, 21 App. D. C. 237, S. C. sec. 66; *Nat. Citizens’ Bank v. Toplitz*, 81 App. Div. 593, 81 N. Y. Supp. 422, S. C. sec. 119; *Gansevoort Bank v. Gilday*, 53 Misc. R. 107, 104 N. Y. Supp. 271; *In re Hopper-Morgan Co.*, 156 Fed. 525; *Federal Nat. Bank v. Cross Creek Co.*, 220 Pa. 39, 68 Atl. 1018; *Middleborough Nat. Bank v. Cole*, 191 Mass. 168, 77 N. E. 781; *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1; *Richards v. Market Exch. Bank Co. (Ohio)*, 90 N. E. 1000, S. C. secs. 119, 124. *In re McCord*, 174 Fed. Rep. 72, S. C. sec. 68.

Defendant made a note to its own order and indorsed it for the accommodation of X, who also indorsed the note, which was negotiated to the plaintiff for value. Held, that evidence was not admissible to show an oral agreement between all the parties that the note was to be paid by X. *Gerli v. National Mill Supply Co. (N. J.)*, 73 Atl. 252.

Plaintiff was payee of a note taken for bricks sold to the maker through defendant, who demanded his commission on the sale. Plaintiff refused to pay until the maker paid for the bricks unless defendant would endorse the note, which defendant did and was paid his commission. The note was discounted by a bank and dishonored and notice given to defendant. Plaintiff took up the note and sued defendant on it. A verdict was directed for the plaintiff. Held error, that whether defendant’s indorsement was for plaintiff’s accommodation was a question for the jury. Also,

that neither the promise to pay a debt nor its subsequent payment was "value" within the meaning of section 29. Also that the words "value therefor" in section 29 mean value for the negotiable instrument, not value for the use of the name, and that one may be an accommodating party although he is paid something for the use of his name. *Morris County Brick Co. v. Austin* (N. J.) 75 Atl. 550.

Where it was agreed between the maker and the payee of a note that each should receive one-half the proceeds of the discount and pay one-half of the note, the maker was not an accommodation maker. *Reyburn v. Queen City Savings Bank & Trust Co.*, 171 Fed. 609, 96 C. C. A. 373. The N. I. L. was not cited in this case.

An accommodation note may be negotiated after maturity even though it be the first negotiation and to one having knowledge of the accommodation so as to make the accommodation maker liable. *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931; *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, *semble*, S. C. sec. 52.

Sed quaere, whether it is not the business view, that there is an understanding that the accommodated party shall take care of the paper at maturity, which would be inconsistent with a right in the accommodated party to negotiate it after maturity? It is submitted that there is nothing in the N. I. L. to negative this view and the case is contrary to the majority of the American cases.

But if an accommodation note has once been negotiated and paid at maturity it is extinguished and can not be re-issued so as to bind the accommodating party. A repeated use of the instrument is not within the authority given. *Comstock v. Buckley*, (Wis.), 124 N. W. 414, S. C. sec. 58.

Knowledge of an indorsee for value that the note was given for the accommodation of the payee is not a defense to an action by the indorsee against the accommodating maker. Nor is an agreement between the payee and maker that the note should be deposited in a bank as collateral security for advances to be made to the payee (and which were made) and that the bank should hold and not negotiate the note, although the indorsee of the bank had knowledge of the agreement. The bank being a holder in due course could transfer its rights to the plaintiff. *Black v. Bank of Westminster*, 96 Md. 399, 54 Atl. 88, S. C. sec. 56.

A manufacturing corporation has no power to bind itself as an accommodation party. Therefore in such a case the plaintiff must show both that he paid value and also that he did not know of the accommodation character of the instrument. *Natl. Bank v. Snyder Co.*, 117 App. Div. 370, 102 N. Y. Supp. 478; *Bradley Engineering Co. v. Heyburn* (Wash.), 106 Pac. 170, S. C. sec. 119; Cf. *In re Troy & Cohoes Shirt Co.*, *infra*, sec. 56.

The possession and negotiation by the maker of a note with the indorsement of the payee imports that the indorsement was for accommodation, and neither sec. 29 nor sec. 22 give power to a corporation to make accommodation indorsements. *Oppenheim v. Simon Reigel Cigar Co.*, 90 N. Y. Supp. 355.

This section has not changed the law of New York that an accommodation note transferred by the accommodated payee at a greater discount than the legal rate is unenforceable by the transferee. *Strickland v. Henry*, 66 App. Div. 23, 73 N. Y. Supp. 12; *Bruck v. Lambeck*, 63 Misc. Rep. 117, 118 N. Y. Supp. 494 (transfer by accommodated maker), S. C. sec. 66; *Simpson v. Hefter*, 42 Misc. R. 482, 87 N. Y. Supp. 243. Cf. *Schlesinger v. Kelly*, *infra*, sec. 55.

The payee of a raised check asked plaintiff, a depositor in a drawee bank, to introduce him to the bank. Plaintiff asked the teller if the check was good, to which he answered, "Perfectly, I believe." At the request of the teller the plaintiff indorsed the check and the bank paid it. Upon finding that the check was raised, the bank deducted the full amount of the check from plaintiff's account. Plaintiff sued the bank. Held, that plaintiff was an accommodation indorser, and, as such, liable to the bank, but only for the difference between the original amount and the raised amount. *Smith v. State Bank*, 54 Misc. R. 550, 104 N. Y. Supp. 750. *Sed quare* whether plaintiff was liable at all? The drawee bank was not a holder for value under sec. 29. See *Farmers' Bank v. Bank of Rutherford*, *infra*, sec. 66. Nor did plaintiff receive the money or mislead the banker. He only identified the payee.

An accommodation maker of a note is liable to one to whom it was indorsed in payment of an antecedent debt, the use of the note not having been restricted by the maker. *English v. Schlesinger*, 55 Misc. R. 584, 105 N. Y. Supp. 989.

Parol evidence is necessary to show whether a party is an accommodation party and also to determine which party he accommodated. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, S. C. sec. 64-2, 64-3, 68.

Wittman v. Glass, 117 N. Y. Supp. 940, seems to hold contrary to section 29, although the court does not cite the section, that knowledge that the instrument was for accommodation would defeat it even where plaintiff gave value for it. The plaintiff had materially altered the note and this was sufficient reason for denying recovery even according to the original tenor. (See section 124.)

ARTICLE III.

NEGOTIATION.

SEC. 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.(a)

(a) *Schlesinger v. Kurzrok*, 47 Misc. R. 634, 94 N. Y. Supp. 442, S. C. sec. 187; *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. 999, S. C. secs. 18, 49; *Nat. Bank of Commerce v. Pick*, 13 N. D. 74, 99 N. W. 63, S. C. sec. 52; *R. J. & B. F. Camp Lumber Co. v. State Savings Bank (Fla.)*, 51 So. 543.

An allegation that the payee "indorsed and transferred" is a sufficient allegation of delivery. *Seemle*, that it is enough to allege that he indorsed the note. *Louisville Co. v. International Trust Co.*, 18 Col. App. 345, 71 Pac. 898.

A denial that a note was ever duly negotiated or discounted for value is not demurrable. It is a statement of fact, not a conclusion of law. *Rogers v. Morton*, 46 Misc. R. 494, 95 N. Y. Supp. 49, S. C. secs. 26, 52.

The plaintiff made a note to the order of X, who was to negotiate it for plaintiff's benefit. About three months later after several unsuccessful attempts to negotiate the note, plaintiff asked X for the note and was falsely told that it had been destroyed. About six months thereafter but before its maturity X delivered the note, without indorsing it, to defendant as collateral for a loan to himself. Plaintiff sued to restrain defendant from disposing of the note and for its cancellation. Held, that the relief should not be granted, that although defendant was not a holder in due course under the Negotiable Instruments Law, yet plaintiff was liable to him on the ground that X was his agent to borrow money for him. *Sublette v. Brewington (Mo. App.)*, 122 S. W. 1150; *Sed quære* whether X had authority to transfer the note otherwise than by indorsement? Moreover, the authority clearly seems to have been terminated when plaintiff was informed that the note had been destroyed. See 23 *Harvard Law Rev.* 479.

The holder of a note payable to order before its transfer is the payee and not one who claimed to have possession of it as agent of the payee. *Scotland County Natl. Bank v. Hohn (Mo. App.)*, 125 S. W. 539, S. C. sec. 19.

The cashier of a bank sold certain notes, indorsed in blank by the payee, to defendant who deposited them in his private box in the bank. The cashier had a key to the box and was authorized by defendant to collect the notes. The cashier abstracted the notes from the box and sold them to plaintiff, a *bona fide* purchaser. Plaintiff deposited them in his private box, authorizing the cashier to collect them. When the notes were due the cashier got new notes from the maker, payable to the order of defendant, forged defendant's indorsement and deposited the notes in plaintiff's box where they were found after the suicide of the cashier. Held, that there was sufficient delivery of the original notes to plaintiff to complete a valid transfer, whether they were deposited in his box by him or by the cashier, and that plaintiff was entitled to impress a trust on the new notes taken in place thereof. *Irwin v. Deming*, 142 Iowa, 299; 120 N. W. 645. The N. I. L. is not cited in this case.

SEC. 31. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.²³

The Illinois Act adds "and the addition of words of assignment or guaranty shall not negative the additional effect of the signature as an indorsement, unless otherwise expressly stated."

Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999, S. C. secs. 18, 49; First Nat. Bank v. McCullough, 50 Oregon 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep., 758, S. C. sec. 42.

Stamping the name of the payee on the back with a rubber stamp with his authority and with intent to indorse the instrument, is a valid indorsement, but the indorsement does not prove itself. The N. I. L. was not referred to on this point. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, S. C. sec. 49.

SEC. 32. The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorseees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.²⁴

SEC. 33. An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.²⁵

An allegation in a complaint to which was annexed the note sued on, that it was indorsed to the plaintiff, is sustained by

²³ "It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill without additional words is sufficient. An indorsement written on an allonge, or on a 'copy' of a bill issued or negotiated in a country where 'copies' are recognized, is deemed to be written on the bill itself." B. E. A. s. 32 (1).

²⁴ The provision in the last sentence is not in B. E. A. See section 32 (2).

²⁵ The English Act omits the words "qualified or conditional." B. E. A. s. 32 (6).

showing that the note was indorsed in blank. It is immaterial whether plaintiff's ownership was derived through a special or a blank indorsement. *Cleveland Co. v. Chittenden*, 81 Conn. 667, 71 Atl. 935.

SEC. 34. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument.²⁶ An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

AMES: This section fails to define an indorsement, so as to settle the conflict on the question, as to whether such words as "I assign this note to B" or "I guarantee the payment of this note to B," is an indorsement creating liability as an indorser and giving a holder in due course a title free from equities.

BREWSTER: The liability of a party on a peculiar indorsement, which is outside of negotiability must be settled by a court.

AMES: The very point in controversy is one of negotiability.

McKEEHAN: Much would be gained by deciding what expressions constitute an indorsement. But Professor Ames does not show how it can be done by any sufficiently brief, accurate and comprehensive provision.

Jerman v. Edwards, 29 App. D. C. 535, S. C. sec. 48; *Mackintosh v. Gibbs* (N. J.) 74 Atl. 708, S. C. sec. 66; *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 73 Pac. 873.

An indorsement in blank is not nullified by a guaranty following it and guaranteeing the payment of a greater rate of interest, and costs of collection, and waving demand and notice of non-payment. *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068, S. C. secs. 38, 52-3. The N. I. L. was not cited on this point.

The payee of a check indorsed it, "Pay to the order of," leaving a sufficient blank between said words and his signature to write the name of the holder. Held, that the legal effect of an indorsement is a question of law for the court and not for expert testimony, and that the indorsement made the check payable to bearer and negotiable by delivery. *State v. Hinton* (Oregon), 109 Pac. 24.

²⁶ The last clause is omitted in the English Act. B. E. A. s. 34 (2), but see s. 34 (3), which reads: "The provisions of this Act relating to a payee apply with the necessary modifications to an indorser under a special indorsement."

SEC. 35. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.²⁷

Jerman v. Edwards, 29 App. D. C. 535, S. C. sec. 48.

SEC. 36. An indorsement is restrictive, which either—

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.²⁸

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.²⁹

AMES: Subsections 2 and 3 should be consolidated as follows: "An indorsement is restrictive which vests the title in the indorsee in trust for the indorser or some third person," because, since under section 37 the "agent of the indorser" has the right to sue in his own name, he is in truth a trustee.

BREWSTER: All agents are not technically trustees. The distinction is made to relieve the plaintiff from proving an actual trust.

McKEEHAN: The section preserves an existing distinction. *e. g.*, an indorsement for collection has always been regarded as creating a mere agency which may be revoked at any time. Section 37 probably intended only a procedural change.

²⁷ "By writing above the indorser's signature a direction to pay the bill to, or to the order of, himself or some other person." B. E. A. s. 34 (4).

²⁸ "An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be indorsed, 'Pay D only' or 'Pay D for the account of X,' or 'Pay D or order for collection.'" B. E. A. s. 35 (1).

²⁹ "Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option." B. E. A. s. 8 (5).

SEC. 37. A restrictive indorsement confers upon the indorsee the right,—

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring; (a)
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

The Illinois act adds to subsection 2: "or except in the case of a restrictive indorsement specified in section 36—subsection 2—any action against the indorser or any prior party that a special indorsee would be entitled to bring," and substitutes for the words "his rights as such indorsee" in subsection 3 the words "the instrument," and adds to the end of subsection 3 the words: "specified in section 36—subsection 1—and as against the principal or *cestui que trust* only the title of the first indorsee under the restrictive indorsement specified in section 36—subsections 2 and 3 respectively."

AMES: Under clause 2 an indorser, even though for value, can not be sued by an indorsee in trust for a third person. This is unjust.

BREWSTER: Equity would take care of the case supposed.

McKEEHAN: It is plain that the indorser in such a case should have a right of action against the indorser. How equity would take care of the case is not apparent. It has been suggested that the language of section 37-2 is used in a permissive and not in a restrictive sense. By this construction the indorsee in trust could sue his indorser.

Jerman v. Edwards, 29 App. D. C. 535, S. C. sec. 48.

(a) An indorsee for collection can sue in his own name, but he takes the instrument subject to all equities existing between his indorser and the maker. Payment by the maker to the indorser after the indorsement is a good defense, and parol evidence to show that the indorsee was actual owner of part of the note is inadmissible as tending to contradict the indorsement. *Smith v. Bayer*, 46 Or. 143, 79 Pac. 497, 114 Am. St. Rep. 858.

An indorsee "for collection" can not hold the acceptor where the drawer paid the amount of the bill before maturity to the

indorser and released the acceptor, although said indorsee has paid the amount to the indorser. Under sec. 35 Bills of Exchange Act such indorsee gets no property in the bill. *Williams, Deacon & Co. v. Shadbolt*, 1 Cababe & Ellis, 529.

Sed quære as to this case? It is true, that section 35* defines a restrictive indorsement as one "which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof." But does this mean anything more than that the beneficial ownership does not pass? Section 35 (2) gives the restricted indorsee the right to sue, for which legal title is necessary. The drawee's payment was to the *cestui* after the trust had ceased, for payment by the indorsee to the indorser should have that effect, and the acceptor ought not to be allowed to set up a release by the drawer since the bill was not given up or exhibited, and the acceptor therefore knew that it might be in the hands of a third person.

SEC. 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.³⁰ (a)

The Michigan Act reads: "Such an instrument" instead of "such an indorsement" an evident error.

(a) *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, S. C. sec. 1.

The payee wrote on the back of the instrument the words "I hereby transfer and assign all my right, title, and interest in and to the within note." Held, that this is a qualified indorsement and equivalent to an indorsement without recourse. *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847. The court seemed to treat the instrument as negotiable in form, but as set out in the statement of facts it was not so.

The fact that an indorsement is "without recourse" is not enough to put a purchaser upon notice of equities. *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068, S. C. secs. 34, 52-3.

* *Supra*, p. 43, n. 28.

so "The drawer of a bill, and any indorser, may insert therein an express stipulation (1) negotiating or limiting his own liability to the holder; (2) waiving as regards himself some or all the holder's duties." B. E. A. s. 16,

A writing on the back of a negotiable note signed by the payee "I hereby assign my interest in this note to G," is not a legal indorsement enabling G to bring an action therein in his own name, but merely an assignment within Comp. Laws, section 10054, whereby only an assignee of non-negotiable choses in action can sue in his own name. Nor does section 38, N. I. L. aid the assignee for, if the writing in question is a qualified indorsement, it constitutes the indorser a mere assignor, and the assignee is here also debarred by Comp. Laws, section 10054, from suing in his own name. *Gale v. Mayhew* (Mich.) 125 N. W. 781.

SEC. 39. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.³¹

SEC. 40. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.³²

The Illinois Act substitutes for "payable to bearer," in line 1, the words "originally payable to or indorsed specially to bearer."

AMES: This section is not in the English Act and it is repugnant to section 9-5. By section 9-1-5 an instrument is payable to bearer, when expressed to be so payable and when the only or last indorsement is an indorsement in blank. If an instrument, payable to order, is indorsed in blank and is specially indorsed by a subsequent holder, it is not under this section payable to bearer. Yet by section 40 this instrument may be negotiated by mere delivery, thus restoring the rule of *Smith v. Clarke*, Peake 225, which as Chalmers says (*Bills of Exchange*, 5th Ed. 24), section 9-5 was intended to abrogate.

BREWSTER: Section 40 implies that the negotiation by delivery is by the owner and under section 49 his title would pass with the right to have an indorsement.

³¹ The words "or his transferee" and the provision in the last sentence are omitted in B. E. A. s. 33.

³² Not in B. E. A.

AMES: Judge Brewster's explanation of section 40 seems an after-thought. To interpolate the words "by the special indorsee" after the word "negotiated," thus restricting the further negotiation by delivery to a delivery by him, is to take an unwarrantable liberty with the statute.

MCKEEHAN: Smith v. Clarke and all the cases following it are cases of instruments *originally payable to order*. None of them refer to instruments *originally payable to bearer*. [The case of Johnson v. Mitchell, 50 Tex. 212, which follows Smith v. Clarke, and in which the instrument was payable to "A, or bearer," seems to have been overlooked.—Ed.] For this reason and also because of the historical and logical distinction between instruments *originally payable to bearer* and those made so by indorsement in blank, section 9-5 may abrogate the rule of Smith v. Clarke and restrain the negotiation by delivery of an instrument, payable to order and indorsed in blank, and subsequently indorsed specially, leaving section 40 to apply only to instruments expressly made payable to bearer. In this way, and in this way only, can the two sections be harmonized.

SEC. 41. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

The Wisconsin Act inserts "joint" before "indorsees" in line two.

First Natl. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4.

An assignment by one joint payee of his interest to another payee carries with it authority to indorse the instrument for him. The N. I. L. was not cited, Kaufman v. State Sav. Bank, 151 Mich. 65, 114 N. W. 863, 18 L. R. A. (N. S.) 630, 123 Am. St. Rep. 259.

SEC. 42. Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.³³ (a)

³³ Not in B. E. A.

(a) Where the president of a bank by authority of the directors discharges the duties ordinarily performed by a cashier, a draft drawn payable to the president by name with the addition of "P't" is payable to the bank. *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13.

S was cashier of the C bank. A certificate of deposit issued by the C bank to the order of "S Cashier" was indorsed "S Cashier," and came to the plaintiff, a holder, in due course. Held, that the indorsement was that of the bank, and that it was not competent for the bank to show that S acted in his own interest and in violation of his duty to the bank. *Johnson v. Buffalo Bank*, 134 Iowa, 731, 112 N. W. 165.

Where a note was indorsed to A, parol evidence is not admissible to show that a bank was intended as indorsee, even though A is, in fact, cashier of such bank. If A delivers the note to the bank without indorsement, the bank may sue upon it, but subject to equities. *First Nat. Bank v. McCullough*, 50 Oregon, 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758.

SEC. 43. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

SEC 44. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

SEC. 45. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.(a)

(a) *Colborn v. Arbecam*, 54 Misc. R. 623, 104 N. Y. Supp. 986; *German-American Bank v. Cunningham*, 97 App. Div. 244, 89 N. Y. Supp. 836.

SEC. 46. Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.³⁴ (a)

(a) A married woman, accommodation indorser of a note dated and payable in New York, is estopped as against a holder in due

³⁴ Not in B. E. A.

course to show that the indorsement was made in New Jersey, where it would be void. *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A. (N. S.) 299, 111 Am. St. Rep. 717.

SEC. 47. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. (a)

(a) An overdue promissory note is still negotiable within a statute exempting from attachment debts secured by bills of exchange or negotiable promissory notes, and hence the amount due thereon is exempt from foreign attachment. Sec. 47 N. I. L. is consistent with this view. *Oakdale Mfg. Co. v. Clarke*, 29 R. I. 192, 69 Atl. 681.

SEC. 48. The holder may at any time strike out any indorsement which is not necessary to his title. (a) The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.³⁵

Mackintosh v. Gibbs (N. J.), 74 Atl. 708, S. C. sec. 66.

(a) An indorsee indorsed the note to a bank for collection, and upon its dishonor received it back. Held, such indorsee in possession of the note was a "holder" under sec. 191, and that he could sue upon it without striking out his indorsement. Mere possession was sufficient evidence of ownership to support the suit (sec. 51). *New Haven Mfg. Co. v. New Haven Pulp Co.*, 76 Conn. 126, 55 Atl. 604.

One in possession of negotiable paper, indorsed in blank by the payee, is *prima facie* the owner thereof, and the mere erasure of subsequent indorsements does not destroy this presumption. *King v. Bellamy* (Kan.), 108 Pac. 117. The N. I. L. was not cited in this case.

Plaintiff sued the maker and the payee on a note indorsed by the payee in blank, under which indorsement appeared the words "to acc't of B. F. E." Held, that even if these words constituted a subsequent restrictive indorsement, it was not necessary to plaintiff's title, and he could strike it out at the trial and recover as bearer. *Jerman v. Edwards*, 29 App. D. C. 535.

³⁵ Not in B. E. A.

SEC. 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor.(a) But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.³⁶

The Illinois and Missouri Acts, after the word "right" in the first sentence read as follows: "to enforce the instrument against one who signed for the accommodation of his transferor, and the right to have the indorsement of the transferor, if omitted by accident or mistake. But for the purpose," etc.

The Colorado Act inserts after "transferor," at the end of the first sentence, "if omitted by mistake, accident or fraud."

The Wisconsin Act adds at the end of the section: "When the indorsement was omitted by mistake, or there was an agreement to indorse made at the time of the transfer, the indorsement, when made, relates back to the time of transfer."

(a) AMES: If the transferee gets only the title of the transferor, the transferee, even for value of an accommodated payee, could not hold the maker, which would be unjust and contrary to the American cases. This defect could be cured by inserting words giving this right.

BREWSTER: Makes no answer to this criticism of Professor Ames.

McKEEHAN: When the accommodating maker gives a note to the order of the payee, he promises to pay only to one holding under an indorsement and should not be held otherwise.

It has been held in Scotland that under the Bills of Exchange Act, section 31 (4) which is the same as section 49 N. I. L., the transferee for value, but without indorsement, of a bill accepted for the accommodation of the drawer-payee gets the title of the transferor and may hold the acceptor without first getting an indorsement. *Hood v. Stewart*, 17 Session Cases (4th Series) 749. As observed by Professor Ames (*infra*, p. 291, n. 4), if the American courts should follow this Scotch case his objection to section 49 would disappear. Section 49 seems to change the law to the extent that a transfer for value, even without indorsement, of an

³⁶ The English Act omits the provision in the last sentence. B. E. A. s. 31 (4).

instrument, payable to order, passes the legal title, although subject to equities. But accommodation, as against a transferee for value, is not, properly speaking, an equity, but only a defense against the accommodated party and transferees without value. The Scotch precedent ought therefore to be followed.

Keel v. Construction Co., 143 N. C. 429, 55 S. E. 826; Lawless v. State, 114 Wis. 189, 89 N. W. 891, S. C. sec. 125; O'Connor v. Slatter, 48 Wash. 493, 93 Pac. 1078; Manufacturers' Commercial Co. v. Blitz, 131 App. Div. 17; 115 N. Y. Supp. 402.

This section vests the title in the transferee without indorsement, and is not affected by secs. '30, 31. Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999, S. C. sec. 18; Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, S. C. sec. 187.

But the transferee without indorsement of a note payable to order can not be a holder in due course, notwithstanding sec. 59, for under sec. 191 he is neither "holder," because not a payee or indorsee, nor "bearer," because the instrument is not payable to bearer. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, S. C. sec. 31.

Plaintiff sued the maker on a note, on the back of which appeared an indorsement of the name of the payee, but gave no proof of the genuineness of the indorsement. Held, that plaintiff could recover as the equitable owner of the note, subject to any defenses against the payee. Johnson County Savings Bank v. Scoggin Drug Co. (N. C.), 67 S. E. 253. The N. I. L. was not cited in this case.

Where a note secured by mortgage is given to take effect immediately for money to be subsequently advanced, the maker is estopped to assert a failure to advance the money as against a purchaser from the payee in good faith for value and without negligence, although the note was not indorsed by the payee; the rules of sections 49 and 58, N. I. L., giving way to the supreme rule of estoppel *in pais*. Marling v. FitzGerald, 138 Wis. 93, 120 N. W. 388, S. C. secs. 25, 58.

It is submitted that the decision is erroneous for two reasons: First, a transfer of a negotiable note payable to order without indorsement, has no more effect in cutting off equities than the assignment of a chose in action; and in general the assignee of a chose in action is subject to equities against the assignor arising before notice to the debtor of the assignment. Barker v. Barth, 192 Ill. 460, 61 N. E. 388. So if a negotiable note is assigned without indorsement, payment to the payee by the maker who has no notice of assignment is effectual against the assignee. Campbell v. Day, 16 Vt. 558; Vann v. Marbury, 100 Ala. 438, 14 So. 273, 23 L. R. A. 325, 46 Am. St. Rep. 70; Dunn v. Meserve, 58 N. H. 429; Jones v. Witter, 13 Mass. 304. Failure of consideration before notice of the assignment should have the same effect. Second, by section 28, N. I. L., which was not cited by the court, failure of consideration is a matter of defense against any person

not a holder in due course, and the assignee without indorsement can not be a "holder" because he is neither payee, indorsee, or bearer. See section 191.

Defendant, to accommodate C, drew a bill to his own order on C, who accepted the bill and transferred it to plaintiff for a loan. Defendant neglected to indorse the bill, which was not noticed by plaintiff when he made the advance. Held, that defendant was the "holder" of the bill within sec. 2 (N. I. L. sec. 191), that he transferred it by means of C to the plaintiff, and that plaintiff was entitled to have the indorsement of defendant and to recover against him on the bill. *Walters v. Neary*, 21 T. L. R. 146; cf. *Day v. Longhurst*, Weekly notes (1893), 3, S. C. sec. 191.

SEC. 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671, S. C. sec. 121.

ARTICLE IV.

RIGHTS OF THE HOLDER.

SEC. 51. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.³⁷

New Haven Mfg. Co. v. New Haven Pulp Co., 76 Conn. 126, 55 Atl. 604, S. C. sec. 48; *Schlesinger v. Kurzrok*, 47 Misc. R. 634, 94 N. Y. Supp. 442, S. C. sec. 187; *Stanley v. Penny*, 75 Kan. 179, 88 Pac. 875; *Boline v. Wilson*, 75 Kan. 829, 89 Pac. 678; *Cleary v. DeBeck Co.*, 54 Misc. R. 537, 104 N. Y. Supp. 831, S. C. sec. 9-4.

Payment by the bank of a certified check indorsed in blank by the drawer-payee discharges the check, and repayment to the bank by the one who received payment, when threatened with suit, will not entitle him to sue the bank on its certification, although he was a holder in due course and the check was returned

³⁷ "Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill." B. E. A. s. 38 (3).

to him. The money repaid passes to the credit of the depositor and the bank is liable to him for it. *Poess v. Twelfth Ward Bank*, 43 Misc. R. 45, 86 N. Y. Supp. 857, S. C. secs. 16, 187.

Where a promissory note was attached and sold under an execution against the holder, the purchaser may sue thereon in his own name, whether the indorsement by the sheriff was regular or irregular and whether it was indorsed or not. *Fishburn v. Londershausen*, 50 Oregon, 363, 92 Pac. 1060, 14 L. R. A. (N. S.) 1234.

The payee or indorsee of a note in possession thereof, although not the beneficial owner, may strike out his own and subsequent indorsements and may sue in his own name by consent of the owner. *R. M. Owen & Co. v. Storms & Co.* (N. J.), 72 Atl. 441.

Although the Code requires an action to be brought in the name of the real party in interest, yet under section 51 N. I. L. a holder, even though he be a holder only for collection, may sue in his own name. *Craig v. Palo Alto Stock Farm* (Idaho), 102 Pac. 393.

SEC. 52. A holder in due course is a holder who has taken the instrument under the following conditions:—(a)

- 1 That is complete and regular upon its face; (b)
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (c)
3. That he took it in good faith and for value; (d)
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.³⁸

The Wisconsin Act adds: “5. That he took it in the usual course of business.”

(a) *Quiggle v. Herman*, 131 Wis. 379; 111 N. W. 479; *Borough of Montvale v. Peoples' Bank*, 74 N. J. Law, 464; 67 Atl. 67, S. C. sec. 56; *Arons v. Ziegfeld*, 52 Misc. R. 571, 102 N. Y. Supp. 898; *Karsch v. Pottier Co.*, 82 App. Div. 230, 81 N. Y. Supp. 782; *Greaser v. Sugarman*, 37 Misc. R. 799, 76 N. Y. Supp. 922, S. C. sec. 16; *Mitchell v. Baldwin*, 88 App. Div. 265, 84 N. Y. Supp. 1043, S. C. sec. 59; *Ketcham v. Govin*, 35 Misc. R. 375, 71 N. Y. Supp. 991, S. C. sec. 56; *Rowe v. Bowman*, 183 Mass. 488, 67

³⁸ The English Act omits the words “infirmity in the instrument.” B. E. A. a. 29 (1) (b).

N. E. 636, S. C. secs. 28, 125; *Mass. Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959, S. C. secs. 9-5, .16, 56, 191; *German-American Bank v. Cunningham*, 97 App. Div. 244, 89 N. Y. Supp. 836; *Milius v. Kauffmann*, 104 App. Div. 442, 93 N. Y. Supp. 669, S. C. sec. 25; *Goetting v. Day*, 87 N. Y. Supp. 510, S. C. sec. 56; *Benedict v. Kress*, 97 App. Div. 65, 89 N. Y. Supp. 607; *Keegan v. Rock*, 128 Iowa 39, 102 N. W. 805; *Farmers' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. R. 817, S. C. sec. 66; *Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59; *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903, S. C. sec. 56; *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, S. C. sec. 14; *White v. Dodge*, 187 Mass. 449, 73 N. E. 549; *National Bank v. Foley*, 54 Misc. R. 126, 103 N. Y. Supp. 553, S. C. secs. 25, 59; *Siegmeister v. Lispenard Co.*, 107 N. Y. Supp. 158; *In re Troy & Cohoes Shirt Co.*, 136 Fed. Rep. 420, S. C. sec. 56; *Gray v. Boyle*, 55 Wash. 578; 104 Pac. 828; *Buzzell v. Tobin*, 201 Mass. 1; 86 N. E. 923.

Sections 52, 55, 56, and 59 vary the ordinary rule of procedure requiring him who alleges a fact to prove it, but they are not unconstitutional as an invasion of the judicial power by the Legislature. *Johnson County Sav. Bank v. Walker*, 79 Conn. 348, 65 Atl. 132.

An allegation in an answer that plaintiff is not a holder in due course is a conclusion of law and insufficient to show which of the conditions named in sec. 52 has not been complied with. *Rogers v. Morton*, 46 Misc. R. 494, 95 N. Y. Supp. 49, S. C. secs. 26, 30.

The evidence tended to show that plaintiff took for value a check drawn by defendant, but knowing that it had been delivered to the payee upon a condition which had not been fulfilled and that payment had been stopped. Held, error to direct a verdict for the plaintiff, as the question whether plaintiff was a holder in due course within secs. 52, 55, 56 N. I. L. is for the jury. *Groh's Sons v. Schneider*, 34 Misc. R. 195, 68 N. Y. Supp. 862.

A woman delivered to her husband a check made payable to a certain creditor, with instructions to pay her debt with it. The husband handed the check to the creditor as a payment upon a debt of his own to the same creditor who accepted it as such in good faith. Held, the creditor was a holder in due course of the check. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, S. C. sec. 14.

The payee of a negotiable instrument may be a holder in due course. *Ib. Thorpe v. White*, 188 Mass. 333, 74 N. E. 592, *accord*, S. C. secs. 64-1, 124. Cf. *Hathaway v. County of Delaware*, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909, which is *contra* in principle, although the N. I. L. was not cited.

A note payable to the maker's order was indorsed in blank to a bank. The note was afterwards altered by inserting "payable with interest." The bank made a deed of trust of all its property

including the note to secure its creditors. Held, that in Virginia a pre-existing debt is a valuable consideration for a deed of trust to secure it, and that the trustee was a holder in due course and could recover on the note according to its original tenor, under sec. 124. *Trustees of American Bank v. McComb*, 105 Va. 473, 54 S. E. 14, S. C. secs. 25, 52-1.

The payee of a note agreed with the accommodation maker that it should not be negotiated to one R, of which fact R was aware. The payee offered to sell the note to R, who lent the money to S, who bought the note. Before maturity S sold the note to plaintiff, who was ignorant that it was an accommodation note and of the agreement, and who paid for it by his own note to S, who still held it. Held, plaintiff could recover of the maker the full amount of the latter's note. *Mehlinger v. Harriman*, 185 Mass. 245, 70 N. E. 51.

A statute declared that any contract made by or on behalf of a foreign corporation failing to comply with the laws of the State, as to registration, etc., should be "wholly void on behalf of such corporation or its assigns." Held, the word "assigns" as used in the statute did not include a holder in due course of a negotiable instrument made to the order of such corporation. *Nat. Bank of Commerce v. Pick*, 13 N. Dak. 74, 99 N. W. 63. See also *McMann v. Walker*, *infra*, sec. 60.

The payee of an accommodation note indorsed it before maturity to A for goods to be furnished at once and in the future. A furnished goods both before and after the maturity of the note. A sold to plaintiff the note and the debt due from the payee. Held, that the accommodation maker could not set up the defense of want of consideration. *Seemle*; that accommodation paper may be negotiated even after maturity so as to make the purchaser for value a holder in due course. *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109. S. C. *supra*, sec. 29 with comment.

(b) *Elias v. Whitney*, 50 Misc. R. 326, 98 N. Y. Supp. 667, S. C. sec. 124.

The fact that the words "payable with interest" are written on a blank space after the words "value received" in the same handwriting as the other written parts of the note, does not prevent the note being complete and regular on its face. *Trustees of American Bank v. McComb*, 105 Va. 473, 54 S. E. 14, secs. 25, 52.

A partner in a firm which had dissolved, but without giving notice thereof, signed notes in blank payable to X and sent them to X or to a bank where they were filled up as to date, amount, and maturity by the cashier as occasion required, and the proceeds placed to the credit of X. Held, that the bank was not a holder in due course, and could not recover against the retired partner without proof that he had authorized or ratified the issue of the notes. *Hunter v. Allen*, 127 App. Div. 572; 111 N. Y. Supp. 820, sub nom. *Hunter v. Bacon*.

A post-dated check is valid and negotiable, and is complete and regular on its face, notwithstanding it is stamped as a check, and not as a bill of exchange payable on time. *Hitchcock v. Edwards*, 60 L. T. Rep. 636.

The defendant accepted a bill otherwise complete, but the place for the drawer's signature was left blank and under it was written, "Drawn to the order of X." The bill was sent to X to be used for a certain purpose. X instead of using the bill for such purpose transferred it to plaintiff, who paid value *bonafide*. X indorsed the bill, but neglected to sign it as drawer until after it was overdue and dishonored. Held, that the bill was not complete and regular when plaintiff took it and that he could not recover. *South Wales, etc., Co. v. Underwood* (Q. B. Div. 1899), 15 T. L. Rep. 157.

(c) *Lindsay v. Dutton*, 217 Pa. 148, 66 Atl. 250; *McGehee v. Cooke*, 55 Misc. R. 40, 105 N. Y. Supp. 60.

A note providing that any delinquency in the payment of interest "shall cause the whole note to immediately become due and collectible" is made overdue by the failure to pay the interest when due, and a subsequent taker can not be a holder in due course. *Hodge v. Wallace*, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938.

A note payable one day after date is not overdue at any time on the day after its date. *Wilkins v. Usher*, 123 Ky. 696, 97 S. W. 37, S. C. sec. 25.

A bill drawn for the acceptor's accommodation but which had never been negotiated was in the hands of the drawer after maturity, and having come into the possession of the drawer's solicitors, the latter claimed a lien on it for services previously rendered the drawer in an action to recover the bill from a converter, and sued the acceptor on the bill. Held, that plaintiffs taking the bill overdue could acquire no rights against the acceptor. *Redfern v. Rosenthal*, 86 L. T. Rep. 855; see also sec. 27 (3).

"In his own right" * is not used merely in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world.

A gave a demand note payable to B or order on the understanding that it should not be negotiated. B, however, indorsed the note for value to C. Afterwards A. paid B the amount of the note. B then obtained the note from C by fraud and gave it to A. Held, that A was not a holder for value, the previous payment not being a consideration given when he received back the note, and he is still liable to C on the note. *Nash v. DeFreville* [1900] 2 Q. B. 72.

* See section 119-5, N. I. L.

(d) *Milius v. Kauffmann*, 104 App. Div. 442, 93 N. Y. Supp. 669, S. C. sec. 25; *Fayette Nat. Bank v. Summers*, 105 Va. 689, 54 S. E. 862, 7 L. R. A. (N. S.) 694.

A credit on an old account which does not discharge the debt or any part of it, or extend the time of payment, is not a valuable consideration for the transfer of a note. *National Bank v. Foley*, 54 Misc. R. 126, 103 N. Y. Supp. 553, S. C. secs. 25, 59.

The mere crediting to a depositor's account of a check on another bank, where the account continues to be sufficient to pay the check if it be dishonored, does not make the bank a holder for value. *Citizens' State Bank v. Cowles*, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765. For the English rule in this class of cases see *supra*, sec. 25, p. 33.

The crediting of the purchase price of a note by the buyer (a bank) to the seller is not giving value, except to the extent of the money actually drawn and charged against the credit before notice. *Hodge v. Smith*, 130 Wis., 326, 110 N. W. 192, S. C. secs. 16, 55; *Albany Co. Bank v. People's Ice Co.*, 92 App. Div. 47, 86 N. Y. Supp. 773.

A bank giving credit for the amount of a note is not a holder in due course of business when such credit is not absorbed by an antecedent indebtedness or exhausted by subsequent withdrawals. *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265, S. C. sec. 56. See also cases under section 25.

But if the bank assumes a legal obligation to a third person (promising to honor a check of the depositor) on the faith of the deposit or credit, it becomes a holder for value. *Montrose Sav. Bank v. Claussen*, 137 Iowa, 73, 114 N. W. 547.

A bank discounting a note and obtaining credit in favor of the seller in another solvent bank for the amount, is a holder for value. But the mere statement that such credit was given, when it does not appear how it was given or that it was ever used, is not enough to enable the court to determine whether the credit was real and substantial. *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068, S. C. secs. 34, 38.

A bank credited the amount of a note to the payee, who died insolvent the next day. Held, that the fact that at the time of his death the amount to his credit was less than the proceeds of the note did not prove the bank to be a holder for value to the extent of the difference, without evidence that the difference was caused by payment of an overdraft or other past due obligation of the payee, or payment of checks drawn by the payee. *Consolidation Bank v. Kirkland*, 99 App. Div. 121, 91 N. Y. Supp. 353. *Sed quære?* See dissenting opinion of Houghton, J.

Proof that the holder paid full value before maturity makes out a *prima facie* case of good faith. *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192, *semble*, S. C. secs. 16, 55. But see *Natl. Bank v. Foley*, *infra*, sec. 59, *contra*.

That plaintiff took a note, indorsed without recourse, without knowing the makers and without making inquiry as to their finan-

cial condition, except of the payee, and paid only a little over half the face are facts to be considered by the jury in the question of plaintiff's *bona fides*. *Jobes v. Wilson* (Mo. App.), 124 S. W. 548, S. C. sec. 59.

Where a corporation took over the assets of a private bank and agreed to assume the liabilities in consideration of the transfer of the assets of the bank, among which was defendant's note, the corporation took the note subject to a contemporaneous parol agreement by which the note never became an absolute obligation in *presenti*. *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841, S. C. sec. 16. *Sed quaere?* See dissenting opinions and comment under sec. 16, *supra*.

A finding that plaintiff paid value but did not purchase a note before maturity in good faith does not negative his title, but only the *bona fides* of his purchase. *Case v. Beyer* (Wis.), 125 N. W. 947. The N. I. L. was not cited in this case.

The manager of a bank stole negotiable securities from the bank and pledged them with A. He afterwards got them back, with other negotiable securities from A by fraud and replaced them in the bank. The bank knew nothing of the transaction. Held, that the bank was a holder in due course and entitled to keep the securities. *London & County Banking Co. v. London & River Plate Bank*, 21 Q. B. D. 535.

Quaere whether the payee of a note obtained by fraud can be a "holder in due course"? *Lewis v. Clay*, 14 T. L. Rep. 149; *Herdman v. Wheeler*, [1902] 1 K. B. 361. That he can be, see *Lloyd's Bank v. Cooke* [1907] 1 K. B. 794, 805-808, *semble*. See *supra*, sec. 14.

SEC. 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.³⁹ (a)

(a) *Trustees of American Bank v. McComb*, 105 Va. 473, 54 S. E. 14, S. C. secs. 25, 52.

Sixteen months is not an unreasonable time where payments of monthly interest were made to the payee and also to plaintiff

³⁹ "Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue." B. E. A. s. 86 (3). "A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section (relating to transfer) where it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact." B. E. A. s. 36 (3). The same rule would apply to a check. B. E. A. s. 73.

after he took the instrument. *McLean v. Bryer*, 24 R. I. 599, 54 Atl. 373, S. C. sec. 64-1.

Five days between the issue and negotiation of a cashier's check is not an unreasonable time, such a check, whether certified or not, being a bill of exchange payable on demand. *Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522, S. C. sec. 59.

A check dated and issued on one day and negotiated at noon the next day is not overdue so as to convey notice to the indorsee of its illegality or of its previous dishonor. *Matlock v. Scheuerman*, 51 Oregon, 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747, S. C. secs. 25, 56, 186.

This section repeals the former statute whereby a demand note was overdue immediately for purposes of transfer so as to let in equities. Therefore a check invalid in the hands of the payee because delivered on Sunday is good in the hands of a *bona fide* purchaser for value without notice and within a reasonable time. *Gordon v. Levine*, 197 Mass. 267, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361, S. C. sec. 186.

SEC. 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.⁴⁰ (a)

(a) *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192, S. C. secs. 16, 52-3, 55; *Goetting v. Day*, 87 N. Y. Supp. 510, S. C. sec. 56; *Walters v. Rock* (N. D.), 115 N. W. 511; *Bank of Morehead v. Hernig*, 220 Pa. 224, 69 Atl. 679.

Where a bank discounted a note and placed the proceeds to the credit of the depositor, *quaere* whether the mere fact that the note was not paid when due is such notice of defect of title of the depositor as to make the subsequent payment of the balance of the proceeds a wrongful payment. *Albany County Bank v. People's Ice Co.*, 92 App. Div. 47, 86 N. Y. Supp. 773.

SEC. 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto,⁴¹ by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration,

⁴⁰ Not in B. E. A.

⁴¹ The English Act uses the words "the acceptance thereof" instead of "any signature thereto." B. E. A. s. 29 (2).

or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

The Kansas Act reads "alleged consideration" a clerical error.

The Wisconsin Act (sec. 1676-25) adds the following: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

Keegan v. Rock, 128 Iowa 39, 102 N. W. 805; *Yakima Bank v. McAllister*, 37 Wash. 566, 79 Pac. 1119; *Groh's Sons v. Schneider*, 34 Misc. R. 195, 68 N. Y. Supp. 862, S. C. *supra*, sec. 52; *Johnson Co. Sav. Bank v. Walker*, 79 Conn. 348, 65 Atl. 132, S. C. sec. 52; *McNight v. Parsons*, 136 Iowa 390, 113 N. W. 858, 125 Am. St. Rep. 265, S. C. secs. 52-3, 56; *Hynes v. Plastino*, 45 Wash. 190, 87 Pac. 1127; *Wood v. Babbitt*, 149 Fed. Rep. 818; *Mitchell v. Baldwin*, 88 App. Div. 265, 84 N. W. Supp. 1043, S. C. sec. 59; *German-American Bank v. Cunningham*, 97 App. Div. 244, 89 N. Y. Supp. 836; *Bank of Morehead v. Hernig*, 220 Pa. 224, 69 Atl. 679.

The title of the payee of a note is defective where the only consideration is accrued interest on a loan previously made at an unlawful rate of interest. *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884.

Defendant bank paid its cashier's check to an indorsee of the payee after notice that the indorsement had been made in an unlawful gambling transaction. Held, that the bank was liable over again to the payee although the statute against gambling did not in express terms declare gambling contracts void. *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 88 N. W. 724.

Illegality ceases to be a real defense under the N. I. L. unless made so by a subsequent statute. The statutes previously in force declaring void instruments given for gaming are impliedly repealed by the N. I. L. *Wirt v. Stubblefield*, 17 App. D. C. 283; *Schlesinger v. Kelly*, 114 App. Div. 546, 99 N. Y. Supp. 1083 (usury), per opinion of Laughlin, J., distinguishing *Strickland v. Henry*, *supra*, sec. 29; *Broadway Trust Co. v. Manheim*, 47 Misc. R. 415, 419, 95 N. Y. Supp. 93 (usury), *semble*; *Schlesinger v. Lehmaier*, 191 N. Y. 69, 73, 83 N. E. 657, 658, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591, *semble*; *Klar v. Kostiuk*, 119 N. Y. Supp. 683 (usury), S. C. sec. 66; *Horowitz v. Wollowitz*, 59 Misc. Rep. 520, 110 N. Y. Supp. 972 (usury), S. C. sec. 66; *Wood v. Babbitt*, 149 Fed. Rep. 818, 822 (usury), *semble*. See also the opinion of Willard Bartlett, J., in *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619 (usury), *accord*. But the opinion of Cullen, C. J., in the last-mentioned case is *contra*, and so also is the case of *Alexander v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353 (gaming). See also *Lawson v. First Nat. Bank (Ky.)*, 31 Ky. Law Rep. 318,

102 S. W. 324, holding that a statute making void a peddler's note unless indorsed with the words "Peddler's note" is not repealed by implication by the N. I. L. *McAfee v. Mercer Nat. Bank* (Ky.), 31 Ky. Law Rep. 863, 104 S. W. 287, *accord*. Cf. *Arnd v. Sjoblom*, *infra*, sec. 57. In *Quiggle v. Herman*, 131 Wis. 379, 111 N. W. 479, a note given for a stallion and not containing words stating the consideration, as required by statute, was held void as between the parties; but as plaintiff had notice of the consideration. the question of the effect of the N. I. L. was not considered.

If one of the signatures of several makers is obtained by fraud so as to make the title of the payee defective as to him, it will be defective as to the other makers also, since the equality of burden is thus disturbed and increased as to them. *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192, S. C. secs. 16, 52-3. But a holder in due course can recover against those who signed. *First Nat. Bank of Durand v. Shaw*, 157 Mich. 192, 121 N. W. 811. The fraud consisted in the fact that the signatures of some of the makers were forged. The N. I. L. was not cited.

In Wisconsin the following words are added to the section: "and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care." Held, that in a case covered by this clause the note was void not only as to the maker so defrauded, but also as to all the makers. *Aukland v. Arnold*, 131 Wis. 64, 111 N. W. 212. Cf. *Arnd v. Sjoblom*, *infra*, sec. 57.

Where the defendant indorsed a note and intrusted it to X to negotiate and give a part of the proceeds to defendant, and X retained the proceeds, it is a question for the jury whether X acted with fraudulent intent from the beginning, so as to constitute a fraudulent negotiation, or merely embezzled the money subsequently. *Demelman v. Brazier*, 198 Mass. 458, 84 N. E. 856, S. C. sec. 118.

X owed plaintiff. In order to provide funds to pay the debt, defendant at X's request drew a check payable to X or order, which X was to pay into his bank to meet his check for the same amount to plaintiff. X indorsed the defendant's check, paid it into his bank and gave his own check to plaintiff. Defendant changed his mind and stopped his check, whereupon X stopped his check and indorsed and delivered defendant's check to plaintiff who had notice of its dishonor. Held, that as the check was an accommodation bill and plaintiff, even assuming that he gave consideration for it, not being a holder in due course, since he took the check with notice that it had been dishonored, took it subject to any defect of title at the time of dishonor, and as X had negotiated it to plaintiff in breach of faith, there was a defect of title attaching to it and the plaintiff could not recover. *Hornby v. McLaren* (C. A., March 31, 1908), 24 T. L. Rep. 494.

An overdue bill indorsed in blank was sold in Norway on a judicial proceeding against one of several joint owners of the

bill. By the laws of Norway the purchaser acquired a good title as against the equity of the other joint owners. Held, that although the bill was drawn and payable in England, sec. 36 (2)* of the Bills of Exchange Act was not applicable and the purchaser was entitled to the bill. *Alcock v. Smith*, [1892] 1 Ch. 238.

In this case Lindley, J. (p. 263), said that " 'defect of title' is a phrase introduced into the Bills of Exchange Act in lieu of the old expression 'subject to equities,' which is an expression not adopted, because the Act applies to Scotland as well as to England, and 'subject to equities' is an expression not known to Scotch law."

SEC. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.⁴²

Quiggle v. Herman, 131 Wis. 379, 111 N. W. 479; *Yakima Bank v. McAllister*, 37 Wash. 566, 79 Pac. 1119; *Groh's Sons v. Schneider*, 34 Misc. R. 195, 68 N. Y. Supp. 862, S. C. sec. 52; *Johnson County Sav. Bank v. Walker*, 79 Conn. 348, 65 Atl. 132, S. C. sec. 52; *Johnson County Sav. Bank v. Rapp*, 47 Wash. 30, 91 Pac. 382; *Packard v. Windholz*, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66, 124; *Johnson v. Buffalo Bank*, 134 Iowa 731, 112 N. W. 165; S. C. sec. 42; *Siegmeister v. Lispenard Co.*, 107 N. Y. Supp. 158; *In re Hopper-Morgan Co.*, 156 Fed. 525; *Bank of Sampson v. Hatcher*, 151 N. C. 359, 66 S. E. 308; *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828; *Feigenspan v. McDonnell*, 201 Mass. 341, 87 N. E. 624; *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 73 Pac. 873.

This section simply reiterates a rule of the common law. *Arnd v. Aylesworth* (Iowa), 123 N. W. 1000, S. C. sec. 59.

It is not material that an indorsee's denial that the instrument was obtained by fraud was insufficient where he had sufficiently denied knowledge or notice of the fraud. *Bothwell v. Corum* (Ky.), 123 S. W. 291.

Merely suspicious circumstances sufficient to put a prudent man on inquiry, or even gross negligence on the part of plaintiff, at the time of acquiring a note, are not sufficient of themselves to prevent recovery unless the jury find from the evidence that plaintiff acted in bad faith. *Valley Savings Bank v. Mercer*, 97 Md. 458, 55 Atl.

* See *Infra*, p. 299.

⁴² Not in B. E. A. "A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not." B. E. A. s. 90.

435; *Hutchins v. Langley*, 27 App. D. C. 234; *Ketcham v. Govin*, 35 Misc. R. 375, 71 N. Y. Supp. 991; *Matlock v. Scheuerman*, 51 Oregon 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747, S. C. secs. 25, 53, 186; *Aldrich v. Peckham*, 74 N. J. Law 711, 68 Atl. 345; *Kipp v. Smith*, 137 Wis. 234, 118 N. W. 848; *Rice v. Barrington*, 75 N. J. Law 806, 70 Atl. 169; *Jefferson Bank v. Chapman-White Lyons Co.* (Tenn.), 123 S. W. 641, S. C. sec. 57; *Dorsey v. Wellman* (Neb.), 122 N. W. 989. But if the purchaser does in fact suspect and fails to make investigation lest it disclose a defense, he is not a purchaser in good faith. *Walters v. Rock* (N. D.), 115 N. W. 511; *Iowa Nat. Bank v. Carter* (Iowa), 123 N. W. 237, S. C. secs. 4, 25.

Municipal bonds payable to bearer are negotiable instruments. The fact that the mayor of a municipality had signed, as mayor, negotiable municipal bonds, which he wrongfully appropriated and pledged to secure a loan to himself, is not sufficient to charge the pledgee, who had no knowledge of the pledgor's lack of authority, with notice of the pledgor's defect of title. *Borough of Montvale v. People's Bank*, 74 N. J. Law, 464, 67 Atl. 67.

The question whether the facts have any fair tendency to show bad faith is one of fact and not of law, especially where the evidence of fraud is sufficient to put the burden of showing good faith on the indorsee. *McNight v. Parsons*, 136 Iowa 390, 113 N. W. 858, 125 Am. St. Rep. 265, S. C. sec. 52-3.

The president and treasurer of defendant corporation, without consideration, made notes in the corporate name to the order of the corporation, indorsed them in that name and also individually, and delivered them to the vice-president for the accommodation of a firm of which all three persons were members. An agent of the firm offered them to plaintiff in another city for discount, representing that the notes were for value given by the firm to the corporation, and plaintiff discounted the notes. Held that neither the form of the notes and indorsement, nor the knowledge of plaintiff that the president and treasurer of the corporation were members of the firm, charged plaintiff with notice of the true character of the notes. *In re Troy & Cohoes Shirt Co.*, 136 Fed. Rep. 420. Cf. *Nat. Bank v. Snyder Co.*, *supra*, sec. 29.

Plaintiffs, in renewal of a note made to them by a partnership, took a note of a third person to the order of a corporation, the treasurer of which was known to the plaintiffs to be a member of the partnership. Held, that the plaintiffs were put upon inquiry as to the authority of the treasurer to indorse the name of the corporation. *Pelton v. Spider Lake Co.*, 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963.

As it is out of the usual course of business for a corporation to issue its obligations to its officers, one who takes such an obligation knowing that the payee is an officer or director, is put upon inquiry as to whether the obligation has been lawfully issued. *MacLean, J.*, dissenting. *Orr v. South Amboy Co.*, 47 Misc. R. 604, 94 N. Y. Supp. 524.

Where a corporation has general authority to issue negotiable notes, a note issued by it for *ultra vires* purposes, *e. g.*, for pur-

chase of stock in another corporation is not enforceable by the payee, but is good in the hands of a holder in due course. *Jefferson Bank v. Chapman-White-Lyons Co.* (Tenn.), 123 S. W. 641, S. C. sec. 57.

One who takes in payment of a private debt the promissory note of a corporation, executed by the debtor as an officer of the corporation, does not take in the usual course of business and is charged with notice of any fraud or illegality in the execution of the note. *Kipp v. Smith*, 137 Wis. 234, 118 N. W. 484, *semble*.

The president of a corporation, having no authority to do so, indorsed in payment of his individual debt to defendant a check made payable to the corporation. Held, that the form of the check was notice to defendant of a misuse of the corporation's property in apparent violation of the president's duty and that defendant was liable to the corporation for the proceeds of the check. *Ward v. City Trust Co.* 192 N. Y. 61, 84 N. E. 585, S. C. sec. 25.

A trust company took in part payment from a debtor a check on itself for more than \$35,000, payable to its order, and signed by the treasurer of a company of which its debtor was president. Defendant knew that the capital stock of said company was \$100,000, and that it had little or no surplus. Held, that the trust company was charged with notice of the lack of authority of the treasurer and president to make such use of the company's funds, and was liable for its amount. *Lanning v. Trust Co. of America* (App. Div.), 122 N. Y. Supp. 485. The N. I. L. was not cited in this case.

The treasurer of plaintiff railroad company, authorized to sign checks, deposited to his own account in defendant bank checks drawn by him as treasurer of the railroad company to his own order, and later drew out the money. Held, that the drawee bank was the agent of the plaintiff to determine whether the checks were authorized and properly drawn, and having so decided and paid the checks, the plaintiff could not recover from the defendant, who acted in good faith. The case was distinguished from cases wherein the fraudulent officer was using trust funds to pay his individual debt to the defendant. *Havana Central Railroad Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 27 Banking Law Journal 501. The N. I. L. was not cited.

The treasurer of a corporation drew checks as treasurer and paid his individual debt therewith. Held, that this was not of itself enough to show bad faith on the part of the creditor, the court having found that the creditor took the checks in good faith. *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45.

The fact that the maker presents to a bank for discount a note indorsed in blank by the payee does not constitute notice of wrongful possession by the maker. *Mass. Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959, S. C. secs. 9-5, 16, 124, 191.

In an action against the drawer, held, that the *bona fide* purchaser for value from the payee of a check is none the less a holder in due course because of the erasure of an indorsement of a subsequent party of which a plausible explanation was given at the

time of plaintiff's purchase. *Goetting v. Day*, 87 N. Y. Supp. 510.

A certificate of deposit payable to "A, trustee," or to "A, trustee of B," gives actual notice that it represents a trust fund, and an indorsee is bound to inquire as to the right of the trustee to dispose of it. *Ford v. Brown*, 114 Tenn. 467, 88 S. W. 1036.

The loser of a check indorsed in blank by the payee can not recover from the drawee bank which paid it to a *bona fide* purchaser in due course, although previous to such payment the payee and the drawer gave notice of the loss to the bank and directed the bank not to pay it. *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655, S. C. sec. 9-5. See also *Poess v. Twelfth Ward Bank and Meuer v. Phenix Nat. Bank*, *infra*, sec. 187. Cf. *Elliot v. Worcester Trust Co.*, *infra*, sec. 87; *Pease & Dwyer v. State Nat. Bank*, *infra*, sec. 189.

Taking a check indorsed in blank by the payee from a finder, who was unknown, but was supposed to be the payee, without inquiry as to his identity or further indorsement, does not prove knowledge of the defective title of the finder or bad faith. *Unaka Nat. Bank v. Butler*, *supra*.

Notice of an agreement between the maker and the payee of a note that the payee should do certain things does not affect a purchaser who has no notice or knowledge that the payee has broken his contract. *Black v. Bank of Westminster*, 96 Md. 399, 54 Atl. 88, S. C. sec. 29; *McNight v. Parsons*, 136 Iowa 390, 113 N. W. 858, 125 Am. St. Rep. 265, S. C. sec. 52-3.

Plaintiff paid only one-half its face for a note made payable at a place in Alaska, which was inaccessible for half the year. There was no evidence of lack of good faith. Held, no error to direct a judgment for plaintiff, although the maker had a good defense against the payee. *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903. See also *Lassas v. McCarty*, 47 Oregon 474, 84 Pac. 76, S. C. sec. 57.

SEC. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from⁴³ defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof⁴⁴ against all parties liable thereon.

The Illinois Act after the word "themselves" interpolates a clause excepting the defenses of fraud and circumvention and gaming, which are, by statutes referred to in said clause, made real defences.

⁴³ The English Act reads "from mere personal defenses." B. E. A. s. 38 (2).

⁴⁴ The words "for the full amount thereof" are omitted in the English Act. B. E. A. s. 38 (2).

The Wisconsin Act adds to the section: "Except as provided in sections 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of section 1676-25 (sec. 55 N. I. L.) of this act."

Albany Co. Bank v. People's Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773, S. C. sec. 54; Unaka Nat. Bank v. Butler, 113 Tenn. 574, 83 S. W. 655, S. C. secs. 9-5, 56; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66, 124; Quiggle v. Herman, 131 Wis. 379, 111 N. W. 479, S. C. sec. 55; Rosenthal v. Freedman, 53 Misc. R. 595, 103 N. Y. Supp. 714; Greaser v. Sugarman, 37 Misc. R. 799, 76 N. Y. Supp. 922; Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; Broadway Trust Co. v. Manheim, 47 Misc. R. 415, 95 N. Y. Supp. 93; Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109, S. C. sec. 52; Vander Ploeg v. Van Zuuk, 135 Iowa 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, S. C. sec. 14; Gansevoort Bank v. Gilday, 53 Misc. R. 107, 104 N. Y. Supp. 271, S. C. sec. 25; *In re* Troy & Cohoes Shirt Co., 136 Fed. Rep. 420, S. C. sec. 56; Nat. Bank of Commerce v. Pick, 13 N. Dak. 74, 99 N. W. 63, S. C. sec. 52; Siegmeister v. Lispenard Co., 107 N. Y. Supp. 158; Ketcham v. Govin, 35 Misc. R. 375, 71 N. Y. Supp. 991, S. C. sec. 56; German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836; Klar v. Kostiuik, 119 N. Y. Supp. 683, S. C. secs. 55, 56; Rice v. Barrington, 75 N. J. Law 806, 70 Atl. 169; Johnson County Savings Bank v. Walker (Conn.), 72 Atl. 579.

The purchase of a negotiable promissory note at a heavy discount (two-thirds of the face value) is not of itself enough to prevent the buyer from being a holder in due course and recovering the full amount. *Lassas v. McCarty*, 47 Oregon 474, 84 Pac. 76. See also *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903, S. C. sec. 56.

Evidence that plaintiff bought a note made by responsible persons, when it had less than six weeks to run, for little more than one-half the face value, is enough to carry the question of plaintiff's *bona fides* to the jury. *Becker v. Hart*, 120 N. Y. Supp. 270.

The fact that a bank, which is a holder in due course of a check, obtained by the payee by fraud, sues the drawer alone and not the payee-indorser is not evidence that the bank is no longer the holder, but is suing for the benefit of the indorser. *Choteau Trust & Banking Co. v. Smith*, (Ky.), 118 S. W. 279.

This section changes the law of Tennessee and under it a holder in due course may recover the full amount of the instrument, not merely the amount paid for it. *Jefferson Bank v. Chapman-White-Lyons Co.* (Tenn.), 123 S. W. 641, S. C. sec. 56.

Under N. Y. Laws 1837, c. 430, sec. 1, all usurious securities are void. The National Banking Act provides that a national bank knowingly charging a usurious rate on a loan or discount shall forfeit all interest, but does not make the instrument void. N. Y.

Laws 1900, chap. 310, places State and private banks on a parity with national banks as to usury. A State bank *bona fide* in due course and for value discounted a note which was void for usury as between the original parties. Held, that the bank can recover on the note. *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619. But if the bank had knowledge that the note was usurious as between the original parties it can not recover, Laws 1900, chap. 310, having no application in such a case. *Schlesinger v. Lehmaier*, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.), 626.

The Wisconsin Act adds the words "except as provided in sections 1944 and 1945, of these statutes relating to insurance premiums and also in cases where the title of the person negotiating such instrument is void under the provisions of section 1676-25 (N. I. L. sec. 55) of this Act." (See *Aukland v. Arnold*, *supra*, sec. 55.) Held, that the above-quoted exception does not include a note given for lightning rods which did not contain a statement that it was so given as required by Laws 1903, chap. 438, and that a holder in due course could recover on such a note. *Arnd v. Sjoblom*, 131 Wis., 642, 111 N. W. 666, 10 L. R. A. (N. S.), 842.

SEC. 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable.⁴⁵ But a holder⁴⁶ who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

The Illinois and Wisconsin Acts insert "duress" after "fraud" and substitute "such holder" for "the latter."

Groh's Sons v. Schneider, 34 Misc. R. 195, 68 N. Y. Supp. 862, S. C. sec. 52; *Black v. Bank of Westminster*, 96 Md. 399, 54 Atl. 88, S. C. secs. 29, 56; *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, S. C. sec. 52; *Jennings v. Carlucci*, 87 N. Y. Supp. 475; *Bryan v. Harr*, 21 App. D. C. 190; *Symonds v. Riley*, 188 Mass. 470, 74 N. E. 926; *Packard v. Windholz*, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66, 124; *Fullerton Lumber Co. v. Snouffer*, 139 Iowa 176, 117 N. W. 50, S. C. sec. 119.

⁴⁵ Not in B. E. A.

⁴⁶ The English Act inserts here "(whether for value or not)." B. E. A. s. 29 (3).

A note given for a grain drill with a warranty was transferred to plaintiff after maturity. Held, that a breach of the warranty need not be set up as a counter-claim under the statute respecting assignments, but is properly pleaded as a defense under this section. *American Seeding Co. v. Slocum*, 58 Misc. R. 458, 108 N. Y. Supp. 1042.

A payee whose title is defective can not better it by selling the instrument to a holder in due course and buying it back again. *Andrews v. Robertson*, 111 Wis. 334, 87 N. W. 190, 87 Am. St. Rep. 870.

A note, made or indorsed by defendants for the accommodation of a third person, was delivered to an agent to be negotiated and the proceeds paid to such third person. The agent sold the note to a *bona fide* purchaser but appropriated the proceeds to his own use. At maturity the note was protested for non-payment, and the agent paid it and afterwards sold it to the plaintiff, who had notice of the dishonor and agreed with the agent to extend the time. Held, that the agent having fraudulently sold the note could not acquire a good title by payment to or purchase from the *bona fide* purchaser and could not give a good title to plaintiff. *Comstock v. Buckley*, (Wis.) 124 N. W. 414, S. C. sec. 29.

Only defences existing at the time of its transfer affect a promissory note, although it was not indorsed to the payee. Therefore, where a note was given for advances to be made subsequently, failure of the payee to make the advances will not prevent recovery by the assignee. *Marling v. FitzGerald*, 138 Wis. 93, 120 N. W. 388, S. C. secs. 25, 49. See note criticizing this case, *supra*, sec. 49.

SEC. 59. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course.⁴⁷(a) But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.⁴⁸(b)

⁴⁷ "But if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." B. E. A. s. 30 (2).

⁴⁸ The provision in the last sentence is omitted in the English Act. B. E. A. s. 30 (2).

Colborn v. Arbecam, 54 Misc. R. 623, 104 N. Y. Supp. 986; Engle v. Hyman, 54 Misc. R. 251, 104 N. Y. Supp. 390; Tamlyn v. Peterson, 15 N. Dak. 488, 107 N. W. 1081; Karsch v. Pottier Co., 82 App. Div. 230, 81 N. Y. Supp. 782; Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805; Bryan v. Harr, 21 App. D. C. 190; German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836; Consolidation Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. Supp. 353, S. C. sec. 52-3; Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37, S. C. secs. 25, 52-2; Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, S. C. 49; Johnson County Sav. Bank v. Walker, 79 Conn. 348, 65 Atl. 132, S. C. sec. 52; Hodge v. Smith, 139 Wis. 326, 110 N. W. 192, S. C. secs. 16, 52-3, 55; Kerr v. Anderson, 16 N. Dak. 36, 111 N. W. 614; Vander Ploeg v. Van Zuuk, 135 Iowa 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, S. C. sec. 14; Pelton v. Spider Lake Co. 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963, S. C. sec. 56; McNight v. Parsons, 136 Iowa 390, 113 N. W. 858, 125 Am. St. Rep. 265, S. C. secs. 52-3, 56; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66, 124; Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724, S. C. sec. 55; *In re Troy & Cohoes Shirt Co.*, 136 Fed. Rep. 420, S. C. sec. 56; Lucker v. Iba, 54 App. Div. 566, 66 N. Y. Supp. 1019; Cook v. Am. Tubing Co. 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.), 193; Abmeyer v. First Nat. Bank, 76 Kan. 877, 92 Pac. 1109.

Cedar Rapids Nat. Bank v. Myhre Bros. (Wash.), 107 Pac. 518; Bank of Ozark v. Hanks (Mo. App.), 125 S. W. 221; Hawkins v. Young, 127 Iowa 281, 114 N. W. 1041; City Nat. Bank v. Jordan, 139 Iowa 499, 117 N. W. 758; Packard v. Figliuolo, 114 N. Y. Supp. 753; Ireland v. Scharpenberg (Wash.), 103 Pac. 801; Iowa Nat. Bank v. Carter (Iowa), 123 N. W. 237, S. C. secs. 4, 25, 56; Feigenspan v. McDonnell, 201 Mass 341, 87 N. E. 624; Warren v. Smith (Utah), 100 Pac. 1069; Walters v. Rock (N. D.), 115 N. W. 511; Bank of Morehead v. Hernig, 220 Pa. 224, 69 Atl. 679; Arnd v. Heckert, 108 Md. 300, 70 Atl. 416; Regester's Sons Co. v. Reed, 185 Mass., 226, 70 N. E. 53.

(a) This section is declaratory of the common law. The Negotiable Instrument Act is in the main a codification of the common law rules. Where it lays down a new rule it controls; but where its language is consistent with the rule previously recognized, it should be construed as simply declaratory of the law as it was before the adoption of the Act. *Campbell v. Fourth Nat. Bank* (Ky.), 126 S. W. 114, S. C. sec. 25.

In an action by an indorsee against the maker, where defendant admits that the note was made for a valuable consideration, but denies, on information and belief, the indorsements, it was sufficient for the plaintiff to introduce the note in evidence with the indorsements thereon. *Beck v. Maller*, 131 App. Div. 243, 115 N. Y. Supp. 596.

The burden put upon the plaintiff involves something more than the mere presumption arising from an indorsement regular in form. *O'Connor v. Kleiman* (Iowa), 121 N. W. 1088.

When defendant has proved fraud, the further inquiry is not whether defendant has shown that plaintiff took with notice of the fraud, but whether plaintiff had shown that he took in good faith and without notice. *Cox v. Cline*, 139 Iowa 128, 117 N. W. 48.

When fraud has been shown, the burden is on the plaintiff affirmatively to establish good faith. Whether he has done so is for the jury, and a verdict should not be directed for plaintiff, unless the testimony is not only consistent with good faith, but is such that there is no room for difference of opinion among fair-minded men. *Arnd v. Aylesworth* (Iowa), 123 N. W. 1000, S. C. sec. 56.

In an action on a note the maker gave evidence of duress. *Semble* that it was also incumbent on defendant to show that plaintiff indorsee was not an innocent purchaser of the note. *Callendar Savings Bank v. Loos* (Iowa), 120 N. W. 317.

The court did not refer to and evidently overlooked section 59 N. I. L. See *Keegan v. Rock*, 128 Iowa 39, 102 N. W. 805, and other foregoing Iowa cases.

Defendant having given evidence of fraud, and plaintiff having responded by showing that he acquired the note *bona fide* for value in the usual course of business and before its maturity, it was error to charge that the *prima facie* case of plaintiff was restored, because such instruction assumed the truth of plaintiff's evidence and withdrew the question from the jury. *American Nat. Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738.

Where the evidence establishes that the title of the party negotiating the instrument was defective, the holder claiming to be a purchaser in good faith for value and without notice must make this claim good by the greater weight of evidence. *Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522, S. C. sec. 53; *Louis de Jonge & Co. v. Woodport Hotel Co.* (N. J.), 72 Atl. 439; *Schultheis v. Sellers* (Pa.), 72 Atl. 887.

Proof that plaintiff gave value before maturity is not enough to show good faith. *Natl. Bank v. Foley*, 54 Misc. R. 126, 103 N. Y. Supp. 553, S. C. secs. 25, 52-3. But see *Hodge v. Smith*, *supra*, sec. 52-3, *contra*.

Where the maker did not deny the allegations of the complaint that the payee before maturity indorsed, assigned, and delivered the note to plaintiff for value, an allegation coupled with a defence of failure of consideration, denying that plaintiff was an innocent purchaser for value, raises no issue because the fact intended to be disputed was already admitted by the failure to traverse the allegations of the complaint. *Brown v. Feldwert*, 46 Oregon 363, 80 Pac. 414.

While the burden of proof to show that he or some one under whom he claims is a holder in due course is shifted to the holder when the fraudulent character or negotiation of the paper is

shown, the presumption that the indorsee is a *bona fide* holder for value is not repelled merely by proof that the instrument as between the immediate parties was without consideration. *Mitchell v. Baldwin*, 88 App. Div. 265, 84 N. Y. Supp. 1043, *semble*, *Joveshof v. Rockey*, 58 Misc. Rep. 559, 109 N. Y. Supp. 818. As to the rule where the action is between immediate parties, see cases cited *supra*, sec. 24.

Where a note for the full purchase price of a horse was given to the payee's agent after the greater part of the price had been paid, on the agent's statement that he had no authority to indorse such payment but that he would have the payee do so, the note was obtained without consideration, whether the representations were false or not, and the indorsee of the note has the burden of showing that he is a *bona fide* holder in due course. Under section 59 the burden of evidence is shifted to the plaintiff to show that he acquired the note in due course, whether the proof shows that the note was obtained by fraud or was given without consideration. *Jobes v. Wilson* (Mo. App.), 124 S. W. 548, S. C. sec. 52-3. *Sed quaere*, as to the last point where the proof shows only that the note was without consideration. But see to the same effect *Johnson County Savings Bank v. Mills* (Mo. App.), 127 S. W. 425.

If notes sued on by an indorsee are tainted with fraud in their inception even though this affected the consideration, the burden of proof was upon the plaintiff to show that he gave value. *City Deposit Bank v. Green*, 138 Iowa 156, 115 N. W. 893.

When fraud has been proved, the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith without notice of the fraud. *Tatam v. Haslar*, 23 Q. B. D. 345; *Oakley v. Boulton*, 5 T. L. R. 60; *Harris v. Aldous*, 18 New Zealand L. R. 449.

This section does not affect the practice of the Chancery Division, which requires the amount of the bill to be paid into court or security to be given upon an application for an injunction to restrain the negotiation of a bill alleged to have been obtained by fraud. *Hawkins v. Ward*, W. N. (1890) 203.

Plaintiff paid to defendant a note to which plaintiff's signature as maker was forged, mistaking it for a genuine note of like amount which he had made. Plaintiff sued defendant to recover back the money and was non-suited. Held, error, that the rule is the same as in the case of a payment by the drawee of a bill to which the name of the drawer is forged and that plaintiff could not recover if defendant was a holder in due course. But the burden upon this point was on the defendant under sections 55-59, N. I. L., and the question should therefore have been submitted to the jury. *Jones v. Miners' & Merchants' Bank* (Mo. App.), 128 S. W. 829.

(b) In *Parsons v. Utica Cement Co.*, 80 Conn. 58, 66 Atl. 1024, the court appears to have overlooked the last paragraph of section 59 and held that where the plaintiff acquired the instrument from

a prior holder, who had obtained it fraudulently and without consideration from the rightful owner, the burden was on the plaintiff to prove that he was a holder in due course although defendant the maker, had no defence of its own to the instrument. The last clause of section 59 was intended to codify the contrary case of *Kinney v. Kruse*, 28 Wis. 183. See Crawford Negotiable Instruments Law, 3d Ed. 79 n. (c).

After the second trial of *Parsons v. Utica Cement Co.*, 73 Atl. 785, the court discovered that the instrument had been made and delivered prior to the taking effect of the Negotiable Instruments Law, and deciding the case according to the pre-existing law, the court declined to follow *Kinney v. Kruse*, saying that it is opposed to the strong current of authority. *Sed quaere* unless the rightful owner has notified the maker not to pay. See *Prouty v. Roberts*, 6 Cush. 19; *Carrier v. Sears*, 4 Allen, 336; *Merchants Exch. Bank v. N. B. Savings Institution*, 33 N. J. L. 170; *Brown v. Penfield*, 36 N. Y. 473; *Houghton v. McAuliffe*, 26 How. Pr. 270.

The case of *Voss v. Chamberlain*, 139 Iowa, 569, 117 N. W. 269 is *contra* to the case of *Parsons v. Utica Cement Co.* and regards the last clause of section 59 as intended to settle the conflict of authority on this question.

ARTICLE V.

LIABILITIES OF PARTIES.

SEC. 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.⁴⁹

Where the statute does not declare the instrument void, a holder in due course can recover against the maker on a promissory note made to the order of a foreign corporation, although it had not complied with the statutory conditions to the right to do business in the State. *McMann v. Walker*, 31 Colo. 261, 72 Pac. 1055; *Neyens v. Worthington*, 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.), 142; *Halsey v. Henry Jewett Co.*, 190 N. Y. 231, 83 N. E. 25, *semble*. *Young v. Gaus*, 134 Mo. App. 166, 113 S. W. 735. See also *Nat. Bank of Commerce v. Pick*, *supra*, sec. 52.

⁴⁹ "The maker of a promissory note by making it (1) Engages that he will pay it according to its tenor; (2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse." R. E. A. s. 88.

SEC. 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse;⁵⁰ and engages that on due presentment the instrument will be accepted or⁵¹ paid, or both,⁵² according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

The Colorado and Illinois Acts omit the word "subsequent" before "indorser." The District of Columbia, North Dakota and New York Acts read "accepted and paid."

SEC. 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits,—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and
2. The existence of the payee and his then capacity to indorse.⁵³

The Missouri Act omits "then" before "capacity" in subsection 2.

⁵⁰ "Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse." B. E. A. s. 55 (1) (b).

⁵¹ The English Act reads "and" instead of "or." B. E. A. s. 55 (1) (a).

⁵² The words "or both" are omitted in B. E. A. s. 55 (1) (a).

⁵³ "The acceptor of a bill, by accepting it, (1) Engages that he will pay it according to the tenor of his acceptance; (2) Is precluded from denying to a holder in due course; (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement." B. E. A. s. 54.

AMES: Since an acceptor, by section 62, engages to pay the bill "according to the tenor of his acceptance," he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered by the drawer. A bank certifying a raised check is in the same case, since section 187 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, a *fortiori* a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this country into harmony with the law of nearly, if not indeed all, of the European States.*

Schlesinger v. Kurzrok, 47 Misc. R. 634, 94 N. Y. Supp., 442, S. C. sec. 187; Meuer v. Phoenix Natl. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, S. C. secs. 49. 187.

Defendant bank, without negligence, cashed a forged check on plaintiff bank, indorsed it, "Indorsement guaranteed. Pay any national or state bank or order," and sent it for collection and it was paid by plaintiff, who, upon discovery of the forgery, sued to recover the money. Held, that plaintiff could not recover; that section 62 was intended to adopt the doctrine of Price v. Neal, 3 Burrow 1354, and applied as well to a payment as to an acceptance by the drawee of a forged bill or check. Also, that the indorsement of the defendant bank was not a guaranty to the drawee but only to indorsees, *Seemle*, that such an indorsement is only for collection and does not transfer title to an indorsee. National Bank of Rolla v. First Nat. Bank of Salem (Mo. App.), 125 S. W. 513; National Bank of Commerce v. Mechanics' Am. Nat. Bank (Mo. App.), 127 S. W. 429 accord.

Some unknown person forged a check on plaintiff bank and paid the same to the city to discharge a street assessment on defendants' land, which defendants subsequently sold. The plaintiff bank having paid the check and charged the account of its depositor, upon discovery of the forgery, credited the sum back to the depositor and sued defendants for the amount.

Held, that sec. 62, N. I. L. has no application in behalf of one who has acquired the paper without consideration. That the plaintiff was entitled to be subrogated to the lien of the city as against the proceeds of the sale of the land in the hands of defendants, if it should appear upon a new trial that the payment of the assessments were purely gratuitous and not in discharge of a real or supposed obligation on the part of the depositor or the unknown forger. Title Guarantee & Trust Co. v. Haven, 196 N. Y. 487, 89 N. E. 1082.

* 4 Harvard Law Review, 306, 307.

SEC. 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.⁵⁴

In dealing with irregular indorsements the courts sometimes refer only to section 63, sometimes only to section 64, sometimes to both sections. Therefore the cases herein cited under both sections should be consulted.

Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.), 842, S. C. sec. 64-1; Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671, S. C. sec. 121; McLean v. Bryer, 24 R. I. 599, 54 Atl. 373, S. C. sec. 53, 64-1; Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455, S. C. secs. 64-1, 82-3; Hopkins v. Merrill, 79 Conn. 626, 66 Atl. 174, S. C. secs. 66, 89; Hoyland v. Nat. Bank of Middlesborough (Ky.), 126 S. W. 356, S. C. sec. 89; Pugh v. Sample, 123 La. 791, 49 So. 526; Bank of Montpelier v. Lumber Co. (Idaho), 102 Pac. 685; Mackintosh v. Gibbs (N. J.) 74 Atl. 708, S. C. sec. 66; Perry Co. v. Taylor Bros., 148 N. C. 362, 62 S. E. 423, S. C. sec. 64.

Where defendant's signature appeared with another in the place for the maker's name, he is not deemed an indorser although the body of the instrument names the other signer as a promisor without mention of defendant's name. Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574, S. C. secs. 17-6, 64.

This section abrogates the former rule in New Jersey that the signature of a third person upon the back of a negotiable instrument prior to its delivery to the payee creates *per se* no implied or commercial contract. Wilson v. Hendee, 74 N. J. Law 640, 66 Atl. 413, S. C. secs. 64, 64-1, 68. See also cases under sec. 64-1.

A partner who individually indorses a firm note adds to his liability as maker a several and distinct liability as indorser, and may be sued as such. Nat. Exch. Bank v. Lubrano, 29 R. I. 64, 68 Atl. 944.

The payee of a note, who indorsed it to enable the maker to negotiate it for his own benefit, is liable merely as an accommodation indorser and is discharged if no notice of dishonor is given. Mechanics' & Farmers' Savings Bank v. Katterjohn (Ky.), 125 S. W. 1071, S. C. secs. 109, 196.

Upon a sale of property the seller required the buyer to procure an indorser to a note to be given for part of the price. The buyer executed a note to the seller with the blank indorsement of the de-

⁵⁴ "Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." B. E. A. s. 56.

fendant. Held, that defendant was liable as an indorser and not as a maker. *Roessle v. Lancaster*, 130 App. Div. 1, 114 N. Y. Supp. 387.

The defendants, who were respectively president and secretary and also directors and large stock holders in a corporation, endorsed a note made by the corporation to raise money. When the note matured the company had no money to pay it, as defendants knew. Held, that defendants were liable only as indorsers and could not be held without presentment and notice of dishonor. *McDonald v. Luckenbach*, 170 Fed. 434, 95 C. C. A. 604.

SEC. 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:—

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.⁵⁵(a)
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.⁵⁶(b)
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.⁵⁵(c)

The Illinois Act substitutes for sub-sections 1 and 2 the changes advised by Professor Ames (*infra*, p. 171), as follows:

“1. If the instrument is a note or bill payable to the order of a third person, or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties.

2. If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.”

Thorpe v. White, 188 Mass. 333, 74 N. E. 592, S. C. secs. 52, 64-1, 124; *McLean v. Bryer*, 24 R. I. 599, 54 Atl. 373, S. C. secs. 53, 64-1; *Quimby v. Varnum*, 190 Mass. 211, 76 N. E. 671, S. C. sec. 121; *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, S. C. sec. 89; *Roessle v. Lancaster*, 130 App. Div. 1, 114 N. Y. Supp. 387, S. C. sec. 63.

⁵⁵ Not in B. E. A.

⁵⁶ See note 54 above.

A note recited "The A. B. Co. promise to pay to the order of C," and was signed A. B. Co., E. R. S. Treasurer, J. W. M." *Held*, section 64 was not applicable, because J. W. M. did not place "his signature in blank" on the note and he was therefore not liable as indorser. That there was a plain ambiguity on the face of the note, and that evidence was admissible even against a holder in due course to show that J. W. M. was secretary of the A. B. Co. and intended to sign as such but omitted his title by mistake. *Germania Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574, S. C. secs. 17-6, 63.

This section deals only with the liability of an irregular indorser to the payee and subsequent parties and does not define the rights and liabilities of several irregular indorsers as between themselves. This is done by section 68. *Wilson v. Hendee*, 74 N. J. Law 640, 66 Atl. 413, S. C. secs. 63, 64-1, 68.

One who endorses under this section is entitled to the same defences as to legality or consideration as the maker for whose accommodation he signed. *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644. *semble* S. C. sec. 66.

The Negotiable Instruments Law governs a renewal note made after the passage of the act, although the original note was given before the act, especially where there were new indorsers on the renewal note making in law a new contract with different parties. *Walker v. Dunham*, 135 Mo. App. 396, 115 S. W. 1086.

(a) This section has no application to a case where the signature was placed on the instrument after its delivery to the payee. *Kohn v. Consolidated Co.*, 30 Misc. R. 725, 63 N. Y. Supp. 265. *Secus*, if the indorsement, though made after the note comes into the possession of the payee, was made in pursuance to an agreement between the parties that the note should be so indorsed to be acceptable. *Downey v. O'Keefe*, 26 R. I. 571, 59 Atl. 929, *semble*.

By force of this section and section 63 the law has been changed in States which have adopted the N. I. L. and in which a person signing in blank before delivery for the accommodation of the maker was formerly held to be a joint maker or guarantor. Now he is an indorser, and is chargeable only after presentment and notice of dishonor. *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.), 847, S. C. sec. 120-6;* *Farquhar C. v. Higham*, 16 N. Dak. 106, 112 N. W. 557; *McLean v. Bryer*, 24 R. I. 599, 54 Atl. 373, S. C. sec. 53; *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455, S. C. sec. 82-3; *Peck v. Easton*, 74 Conn. 456, 51 Atl. 134, S. C. sec. 89; *Gibbs v. Guaraglia*, 75 N. J. Law 168, 67 Atl. 81; *In re Swift*, 106 Fed. Rep. 65, S. C. sec. 82-3; *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.), 842; *Perry Co. v. Taylor Bros.*, 148 N. C. 362, 62 S. E. 423. See also *Wilson v. Hendee*, 74 N. J. Law 640, 66 Atl. 413, S. C. secs. 63, 64, 68; *Kohn v. Consolidated Co.*, 30 Misc. R. 725; 63 N. Y. Supp. 265,

* The court cited only sec. 63, but the facts and the reasoning of the court bring the case also under sec. 64-1.

S. C. *infra*, Far Rockaway Bank v. Norton, 186 N. Y. 484, 79 N. E. 709, S. C. *infra*; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. sec. 109; Thorpe v. White, 188 Mass. 333, 74 N. E. 592, S. C. secs. 52, 124.

And in an action by the payee against the indorser under this section, an allegation and evidence of the intention of the indorser to be liable to the payee is unnecessary and immaterial. Far Rockaway Bank v. Norton, 186 N. Y. 484, 79 N. E. 709; Corn v. Levy, 97 App. Div. 48, 89 N. Y. Supp. 658; McMoran v. Lange, 25 App. Div. 11, 48 N. Y. Supp. 1000, *semble*; Kohn v. Consolidated Co., 30 Misc. R. 725, 63 N. Y. Supp. 255, *semble*. See also Gibbs v. Guaraglia, 75 N. J. Law 168, 67 Atl. 81, and Wilson v. Hendee, 74 N. J. Law 640, 66 Atl. 413, S. C. secs. 63, 64, 68.

And parol evidence of a contrary intention is not admissible. The statute fixes the status of the indorser. Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886. See *contra*, Mercantile Bank v. Busby (Tenn.), 113 S. W. 390, S. C. sec. 115 and Kohn v. Consolidated Co., *supra*, *semble*.

(b) AMES: This section is an otherwise excellent piece of codification, but defective because under subsection 2 a party signing as indorser for the accommodation of an acceptor would not be liable to a drawer-payee, but only to subsequent parties. This omission can be remedied by an amendment, a draft of which is given.

BREWSTER: Misapprehends the criticism and so fails to answer it.

MCKEEHAN: Agrees with Professor Ames that the section is defective and that his suggested amendment would improve it.

One, who endorsed a bill in blank before delivery for the purpose of backing the acceptor, is liable to the drawer-payee, who had indorsed and transferred the instrument and was compelled to take it up. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, S. C. secs. 29, 64-3, 68. In this case the court reached the desirable result advocated by Professor Ames without an amendment of the section, by holding that sections 63 and 64-2 merely established a presumption and that parol evidence was admissible to show an intention that the indorser should be liable to the drawer. It is submitted that this decision nullifies the plain language of section 64-2, which defines the parties to whom an anomalous indorser of a bill, payable to the drawer's order, is liable, and does not merely enact a rule of evidence. See cases cited under the preceding sub-section. An aval or backer to an acceptor was not recognized at the common law. Steele v. M'Kinlay, 5 App. Cas. 754.

In Jenkins v. Coomber [1898] 2 Q. B. 168, it was held that, where A drew a bill on B, payable to his own order, which B accepted, and C, in accordance with a previous agreement to guarantee its

payment, wrote his name on the back, and the bill was delivered to A, C was not liable to A as indorser, as the bill had not been indorsed by A before C put his name on the back. That *Steele v. M'Kinlay*, 5 App. Cas. 754, was not changed by section 56 B. E. A. corresponding to section 63 N. I. L.

It has, however, since been held in *Glenie v. Bruce Smith* [1908] 1 K. B. 263, where the defendant indorsed a bill in blank after another had accepted it in blank and the bill was then delivered to plaintiff, who filled it up as drawer, payable to himself, and then indorsed it, that defendant was liable to plaintiff. The court relied on section 20 B. E. A. (section 14 N. I. L.), and thus attempted to distinguish *Jenkins v. Coomber*. This case in effect adopts the Continental rule that there can be an aval or backer for any party to a bill or note including the acceptor of a bill, thus overruling *Jackson v. Hudson*, 2 Campbell 447, and disregarding *Steele v. M'Kinlay*, *supra*.

It has also been held in *Robinson v. Mann*, 31 Canada Supreme Court Reports 484 that under section 56 of the Canadian Bills of Exchange Act of 1890, which is substantially the same as section 56 of the English Act, one who indorses a note may be liable as an indorser to the payee although it had not been first indorsed by the payee. That the statute adopts the aval form of liability of the French Commercial Law, and that the payee is a holder in due course. See also *McDonough v. Cook & Crawford*, Ontario Court of Appeals, April 5, 1909, 45 Canadian Law J. accord. The result in these cases can be more easily reached in England and in Canada where there is so such section in the Bills of Exchange Acts as section 64-2 of the Negotiable Instruments Law.

The construction put by the New York Court of Appeals on section 64-2 seems fatal to uniformity. By the common law of New York the anomalous indorser of a bill might perhaps have been made liable, as indorser, to the drawer-payee by the use of the same fiction that was adopted in the case of the anomalous indorser of a note in *Moore v. Cross*, 19 N. Y. 227, 75 Am. Dec. 326, but this could not have been done in a State where it was held, that a stranger, who wrote his name on the back of a bill before delivery, could not be an indorser but must be a drawer. *Phoenix Co. v. Fuller*, 3 Allen, 441.

The maker of a note, payable to his own order, simply promises to pay, and the drawer of a bill, payable to his own order, simply orders payment to be made to the person he may designate. But neither the maker of such a note nor the drawer of such a bill is in the legal sense of the term an indorser when he writes his name on the back of the instrument. *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596; 45 N. E. 1094, 35 L. R. A. 786. 60 Am. St. Rep. 719; *Pickering v. Cording*, 92 Ind. 306, 47 Am. Rep. 145.

Mercantile Bank v. Busbv (Tenn.), 113 S. W. 390, S. C. *infra*, sec. 115, is in accord with *Haddock, Blanchard & Co. v. Haddock* and *Kohn v. Consolidated Co.*, *supra*, in holding that sections 63 and 64 merely create a presumption and that the real contract may be shown by oral evidence that one who indorsed before delivery

may be shown to be a joint maker and so not entitled to notice of dishonor. For the reasons already stated it is submitted that this decision is also erroneous and to be regretted.

The New York Court of Appeals also relied upon section 68, but it is submitted that it is a fallacy to say that a drawer is an indorser in his relation to parties signing on the back of the bill subsequent to the drawing, and that section 68 does not affect the question involved in section 64-2. See *Wilson v. Hendee*, 74 N. J. Law 640, *supra*.

(c) Parol evidence is necessary to establish whether the indorser signed for the accommodation of the payee. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, S. C. secs. 29, 64-2.

SEC. 65. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants,—

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.(a)

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.⁵⁷

Willard v. Crook, 21 App. D. C. 237, S. C. sec. 66; *State v. Corning Savings Bank*, 139 Iowa, 338, 115 N. W. 937; *Middleborough Nat. Bank v. Cole*, 191 Mass. 168, 77 N. E. 781.

⁵⁷ "(1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a 'transferor by delivery.' (2) A transferor by delivery is not liable on the instrument. (3) A transferor by delivery who negotiates a bill, thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless." B. E. A. s. 58. There appears to be no special provision in the English Act as to the liability of an indorser with qualification. See *Chalmers*, 6th ed. 40.

The payee of a note secured by chattel mortgage transferred the note and mortgage, indorsing the note as follows: "By agreement with recourse after all security has been exhausted waiving protest." Held, that the indorser was liable only for the balance due after the security has been exhausted, and as no cause of action accrues against him until the security is exhausted he can not be joined as a defendant in the action to foreclose the mortgage. *Smith v. Bradley*, 16 N. Dak. 306, 112 N. W. 1062.

An action for cancellation of a note because cashier's checks received therefor were worthless is not an action for breach of warranty in negotiation of the checks, and is therefore not governed by this section. *Dille v. White*, 132 Iowa, 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510, S. C. *supra*, sec. 6-5.

The transferor by delivery of a forged note is not released from liability as warrantor by the act of the transferee in receiving interest from the alleged maker and extending the note, without the consent of the transferor, all the parties being still in ignorance of the forgery. *Cluseau v. Wagner* (La.), 52 So. 547.

(a) AMES: 1. The warranty of an indorser without recourse should run only to his immediate transferee. The liability being extrinsic to the bill should be the same as that of a transferor by delivery. There is no authority for the distinction made in this section (sub-section 4), and *Watson v. Cheshire*, 18 Iowa 202, 87 Am. Dec. 382 is directly opposed to it, and holds that a subsequent transfer or indorsement is not of itself an assignment of the warranty of the indorser without recourse.

2. By this section (sub-section 4) the transferor of an instrument, void for usury, is not liable as warrantor, unless he was aware of the usury, thus codifying the discredited case of *Littauer v. Goldman*, 72 N. Y. 506, 28 Am. St. Rep. 171, although he is made liable as warrantor, irrespective of his knowledge, if the instrument is void for coverture or voidable for infancy. Again, if knowledge is necessary in the case of an indorser without recourse, why not also in the case of an indorser without qualification? Yet sub-section 4 of section 65 is not incorporated in section 66 as are sub-sections 1, 2 and 3 of section 65.

3. In sub-section 4 the last words "it valueless" should be changed to "its collectibility." The warranty should attach if the instrument is worth, for instance, fifty cents on the dollar.

BREWSTER: In 2 Ames Cases on Bills and Notes, 840, 882 an indorser without recourse is made liable to his indorsee and subsequent holders.

Makes no answer to Professor Ames' second and third criticisms on sub-section 4.

AMES: The passage referred to by Judge Brewster was a youthful indiscretion, but, even there, no distinction was made between the indorser without recourse and the transferor by delivery, the writer erroneously conceiving that in both cases the warranty ran to subsequent holders.

MCKEEHAN: 1. Discusses the difference between the English theory of estoppel against the indorser without qualification, precluding him from denying not only to his indorsee but to any holder in due course, his title, the genuineness of the instrument, etc., and the prevalent American theory that an indorsement includes a warranty of the same things to the indorsee and to subsequent holders and shows that while the Negotiable Instruments Law in sections 61 and 62 follows the English Act in expressing the liabilities of the maker, drawer and acceptor, it departs from the English Act as to the theory of the indorser's undertakings and in sections 65 and 66 N. I. L. adopts the theory of warranty, and applies it both to qualified indorsements and to indorsements without qualification.

2. The difference in the effect of indorsements without recourse and transfers by delivery may be justified on the theory that, if the subsequent transfer is by indorsement, such indorsement may be regarded as an assignment of the warranty of the indorser without recourse.

Agrees with Professor Ames that the transferor should be held liable as warrantor if the instrument is void for usury.

SEC. 66. Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.⁵⁸

And, in addition, he engages that on due presentment, it shall be accepted or ⁵⁹ paid, or both,⁵⁹ as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will

⁵⁸ "The indorser of a bill by indorsing it . . . (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements; (c) Is precluded from denying to his immediate or a subsequent indorser that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto." B. E. A. s. 55 (2).

⁵⁹ The English Act reads "and" instead of "or" and omits the words "or both." B. E. A. s. 55 (2) (a).

pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

The Illinois Act interpolates after "indorser" in line one the words "not an accommodating party" and after "three" in subsection 1 the words "and four" and substitutes "every indorser" for "he" in the first line of the last sentence.

AMES: This section betrays the same misconception as to warranty as does section 65. Under it an accommodation indorser, though not a vendor, is liable as warrantor, which is unjust and contrary to the authorities. Suggests amendments of section 65 in accordance with his criticisms which would dispense with all of section 66 between the words "qualification" in the second line and "engages" in the first line of the last paragraph.

BREWSTER: Claims that the section follows the English Act but makes no answer to the criticism of Professor Ames.

McKEEHAN: Agrees with Professor Ames that the accommodation indorser should not be saddled with the warranties of a vendor.

An indorser of a note executed by a corporation by its treasurer can not defend on the ground that the treasurer was not authorized to execute the note. *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644, S. C. sec. 64.

Whether a corporation has power to indorse or not, its indorsement passes title (sec. 22), and a subsequent indorser is liable to a purchaser even though the latter knew that the subsequent indorsement was for the accommodation of the corporation (sec. 29). *Willard v. Crook*, 21 App. D. C. 237.

A made a note to the order of B, forged B's indorsement, then procured C's indorsement for A's accommodation, and negotiated the note. Held, C by his indorsement, guaranteed the genuineness of B's signature, and was liable to a holder in due course. *Packard v. Windholz*, 88 App. Div. 365, 84 N. Y. Supp. 666, affirmed without opinion, 180 N. Y. 549, S. C. sec. 124.

An indorser of a check does not warrant the genuineness of the drawer's signature to the drawee who pays it. The drawee is not a holder in due course under sec. 52, nor a holder under the definition in sec. 191. The drawee when he accepts a check becomes the guarantor thereof. *Farmers' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817. But the drawee may recover back the money when the drawee was without fault and the indorser was guilty of negligence in not discovering the forgery. *Williamsburgh Trust Co. v. Tum Suden*, 120 App. Div. 518, 105 N. Y. Supp. 335. The opinion in this case contains certain dicta to the effect that the indorsement of the payee when presenting the check to the drawee for payment is a warranty or guaranty to the drawee. For a well-founded criticism of these

dicta see 56 Am. Law Reg. (N. S.) (now University of Pennsylvania Law Review), 122. See also 17 Harvard Law Rev. pp. 581-583. See also National Bank of Rolla v. First Nat. Bank of Salem (Mo. App.), 125 S. W. 513, S. C. sec. 62.

An unqualified indorser of a secured installment note can not vary his contract of indorsement by parol evidence that the indorsee at the time of the indorsement agreed to keep him fully advised as to the conduct of the maker respecting the payment of installments and any action of his touching the value of the security, and failed to do so. Hopkins v. Merrill, 79 Conn. 636, 66 Atl. 174, S. C. sec. 89.

An accommodation indorser, who was one of several payees of a note, is not liable to a transferee when the maker without authority altered the note before negotiation by striking out the name of another payee. The warranty of an indorser does not arise in such a case, his liability being fixed by the condition of the instrument when it leaves his hands. Nor can recovery be had according to the original tenor under sec. 124, because the indorsement of all the original payees was necessary to give a good title to the transferee and because the note which defendant indorsed never had an inception. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 109, 119-4. The first reason is good, but the second seems not in accord with the cases under sec. 124, *infra*.

A note made by a corporation was indorsed by defendants before its delivery to the payee. The consideration was known to all parties to be an illegal purchase by the corporation of its own capital stock. Held, that the payee was not a holder in due course because he knew of the illegality and want of consideration, and could not hold the indorsers upon their warranty. Burke v. Smith, (Md.), 75 Atl. 114.

The warranty of an indorser without qualification, running only to a holder in due course, is not available to a plaintiff who discounts for the maker a usurious note indorsed by defendant for the accommodation of the maker and the indorser may set up the defense of usury. Bruck v. Lambeck, 63 Misc. Rep. 117, 118 N. Y. Supp. 494, S. C. sec. 29.

A check on plaintiff bank which had been raised as to the amount, and the date and name of the payee changed, was indorsed in the substituted name and was deposited in defendant bank which indorsed it "Received payment through New York Clearing House. Indorsements guaranteed." Held, that this indorsement was equivalent to a guaranty of the genuineness of the whole instrument including the indorsement, excepting only the signature of the drawer, and that the defendant was bound to refund the money to the plaintiff. New York Produce Exch. Bank v. Twelfth Ward Bank, 134 App. Div. 953, 119 N. Y. Supp. 988. The N. I. L. was not cited in this case.

Plaintiff sued defendant as an indorser. The complaint alleged, that plaintiff made the note to his own order and that defendant indorsed the note and delivered it to plaintiff for value. That upon

presentment at maturity payment was refused and due notice given to defendant as indorser. Held, that the complaint was insufficient. If plaintiff made the note for the accommodation of defendant his remedy is an action for money paid. *Abramowitz v. Abramovitz*, 113 N. Y. Supp. 798.

Under his warranty that the instrument is valid and subsisting, an indorser without qualification, can not defend against a holder in due course on the ground that the instrument was void because of usury in its inception. Even apart from this section, an indorser's contract is a new and independent contract. *Horowitz v. Wollowitz*, 59 Misc. Rep. 520, 110 N. Y. Supp. 972; *Klar v. Kos-tiuk*, Misc. Rep. 119 N. Y. Supp. 683.

A note secured by mortgage on land in California was executed, delivered and payable in California, where it was non-negotiable, but it was indorsed by defendant, the payee, in New Jersey, where, at the time of the indorsement it would have been negotiable under the Negotiable Instruments Law, which had been there adopted, after the making of the note but before the indorsement. By the law of California there can be only one action for the recovery of any debt or the enforcement of any right secured by a mortgage upon real estate.

Held, that it was unnecessary to determine whether the note would have been negotiable in New Jersey prior to the adoption of the Negotiable Instruments Law; that notwithstanding the mortgage had been foreclosed and the land sold, the contract of the indorser was governed by sections 63 and 66 N. I. L. and that the defendant could be held for the unpaid balance. *Mackintosh v. Gibbs* (N. J.), 74 Atl. 708.

Quære whether the N. I. L. had any application to this case since under section 195, the provisions of the Act do not apply to instruments made and delivered prior to its passage, and whether the case should therefor not have been dealt with as one involving the liability of an indorser of a non-negotiable note?

SEC. 67. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.⁶⁰

SEC. 68. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between

⁶⁰ "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." B. E. A. s. 56.

or among themselves they have agreed otherwise.⁶¹ Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.⁶²

AMES: As joint makers, joint drawers and joint acceptors are liable only jointly, why should joint payees or joint indorsers be liable jointly and severally?

BREWSTER: The provision is a convenience in suing and is in accord with the reformed procedure in most of the States.

McKEEHAN: Professor Ames' query "Why this distinction" remains unanswered. But would it not be better to widen the scope of the provision and include joint drawers, joint makers, and joint acceptors?

State Bank v. Kahn, 49 Misc. R. 500, 98 N. Y. Supp. 858, S. C. sec. 120-4; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; Bamford v. Boynton (Mass.), 86 N. E. 900; George v. Bacon, 138 App. Div. 208, 123 N. Y. Supp. 103.

A promise upon good consideration by the second of two accommodation indorsers to indemnify the first, is not a promise to answer for the debt, default, or miscarriage of another within the meaning of the Statute of Frauds, but an original obligation. The evidence admissible under this section may be either written or parol. Wilson v. Hendee, 74 N. J. Law 640, 66 Atl. 413, S. C. secs. 63, 64, 64-1.

The maker of a note who has been obliged to pay it may show by parol evidence that he signed for the accommodation of the payee and subsequent indorsers, and may recover the amount from them. His action is on an implied promise of indemnity and not upon the note. Morgan v. Thompson, 72 N. J. Law, 244, 62 Atl. 410.

The mere fact that the indorsers are accommodation indorsers and known to each other to be so, is not sufficient, without proof of an express agreement, to change the rule that prior indorsers are liable *in solido* to subsequent indorsers who have paid a note. *In re McCord*, 174 Fed. 72.

The drawer of an accepted bill is an indorser within the intention of this section, and as between him and an anomalous indorser parol evidence is admissible to show an intention to make the anomalous indorser liable to the drawer-payee. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, S. C. secs. 29, 64-2. See comment on this case, *supra*, sec. 64-2.

⁶¹ "Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved." B. E. A. s. 32 (5).

⁶² Not in B. E. A.

SEC. 69. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.⁶³

The Illinois Act adds the following.

"Sec. 69a: Whenever any bill of exchange drawn or indorsed within this State and payable without this State is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay such bill at the current rate of exchange and with legal interest from the time such bill ought to have been paid until paid, together with the costs and charges of protest, and on bills payable in the United States in case suit has to be brought thereon and on bills payable without the United States with or without suit, five per cent. damages in addition.

ARTICLE VI.

PRESENTMENT FOR PAYMENT.

SEC. 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument;⁶⁴ (a) but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part.⁶³ But except as herein otherwise provided, presentment, for payment is necessary in order to charge the drawer and indorsers.(b)

⁶³ Not in B. E. A.

⁶⁴ "(1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable. (2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day it matures." B. E. A. s. 52 (1) (2).

"Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable." B. E. A. s. 87 (1).

The Illinois Act interpolates "except in the case of bank notes" after "instrument" in line three.

The Kansas, New York and Ohio Acts interpolate "and has funds there available for that purpose" after "maturity" in line five.

The Wisconsin Act omits all of the first sentence after the words "on the instrument."

AMES: This section changes the law in a number of States as to certificates of deposit and bank notes, and should be amended to except them.

BREWSTER: The objection does not seem to be practical.

McKEEHAN: Agrees with Professor Ames because under this section the statute of limitations would begin to run against a certificate of deposit from its date, which is contrary to business custom, and the language of such instruments.

In re Swift, 106 Fed. Rep. 65, S. C. sec. 82-3; *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, S. C. sec. 89; *Nelson v. Grondahl*, 13 N. Dak. 363, 100 N. W. 1093, S. C. sec. 73; *German-American Bank v. Milliman*, 31 Misc. R. 87, 65 N. Y. Supp. 242, S. C. sec. 75; *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; *Fritts v. Kirchdorfer* (Ky.), 124 S. W. 882.

(a) Presentment for payment is unnecessary to charge the person primarily liable whether the instrument is payable on time or on demand, although it is made payable at a particular place. *Farmers' Nat. Bank v. Venner*, 192 Mass. 531, 78 N. E. 540; *Hyman v. Doyle*, 53 Misc. R. 597, 103 N. Y. Supp. 778.

It is for the maker of a note payable at a specified place to aver and prove that he was ready and offered at the time and place to pay it. No demand by the holder need be averred or proved. *Flourance Oil Co. v. First Nat. Bank*, 38 Colo. 119, 88 Pac. 182.

(b) Presentment and notice of dishonor are necessary to charge the indorser of a note containing an option, which has been exercised, to declare the whole sum due for non-payment of interest. *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113, S. C. sec. 82-3. Cf. *Hopkins v. Merrill*, *infra*, sec. 89.

Where a note names no place of payment, it is generally payable at the maker's residence or place of business. Where a note, payable on or before a given date with the option to the holder to declare the whole due on default as to monthly installments of interest, did not fix a place of payment and the maker had a place of business in the city where the note was payable and was able and willing to make interest payments as they matured, the holder could not declare the note due for failure to pay installments of interest, without presentment, demand and refusal at the maker's place of business, although the note may not be, under section 70

N. I. L., "By its terms payable at a special place." *Bardsley v. Washington Mill Co.* (Wash.), 103 Pac. 822.

By virtue of section 52 (2)* failure to present to the maker on the day of maturity a note made payable at a particular place does not discharge the maker. Presentment at the particular place on a subsequent day is sufficient. *Gordon v. Kerr*, 25 Sess. Cas. 570.

SEC. 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.⁶⁵

The New Hampshire Act adds a provision in effect making sixty days a reasonable time in case of demand notes.

The Nebraska Act omits all of the section after the words "reasonable time after its issue."

German-American Bank v. Milliman, 31 Misc. R. 87, 65 N. Y. Supp. 242, S. C. sec. 75; *Congress Brewing Co. v. Habenicht*, 83 App. Div. 141, 82 N. Y. Supp. 481, S. C. sec. 82-3; *Hampton v. Miller*, 78 Conn. 267, 61 Atl. 952.

Section 71 has abrogated the former distinction between interest-bearing demand bills and notes and those payable without interest, with reference to the time of presentment to charge an indorser. Under this section and section 193 the burden is on the holder to prove presentment within a reasonable time, and the defendant indorser need not plead failure to make due presentment. Where the facts are ascertained and not in dispute reasonable time is a question of law. Circumstances held to make three and a half years an unreasonable time. *Commercial Nat. Bank v. Zimmerman*, 185 N. Y., 210, 77 N. E. 1020. The case of *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987, S. C. sec. 193 is in accord as to the burden of proof.

* See *supra*, p. 87, n. 64.

⁶⁵ "Where the bill is payable on demand, then subject to the provisions of this Act, presentment must be made within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable." B. E. A. s. 45 (2). "Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented, the indorser is discharged." B. E. A. s. 86 (1).

The case of *German-American Bank v. Mills*, 99 App. Div. 312, 91 N. Y. Supp. 142, which held that this section is in effect a statute of limitations, and that the burden was upon the indorser of a demand note to plead and prove that presentment was unreasonably delayed, must be considered as overruled by *Commercial Nat. Bank v. Zimmerman*, *supra*.

It is not universally true that even where the facts shown in evidence are without dispute, the question whether presentment was in reasonable time is for the court. *Citizens' Bank v. First Nat. Bank*, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.), 303, *semble*, S. C. sec. 186.

A demand note payable to the order of the maker, and drawing interest, was indorsed by a third person for the maker's accommodation and was negotiated ten days after its date. Held, that presentment for payment within ten months was sufficient to hold the indorser. *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383. See S. C. secs. 7-1, 73.

Within reasonable limits checks may remain outstanding without discharging an indorser, so long as one negotiation promptly follows another and the checks are in fact in circulation. (*Sed quare* as to this proposition? See *Gordon v. Levine*, *infra*, sec. 186. But see also *Columbian Banking Co. v. Bowen*, *infra*, this section.) The usage of trade or business includes the usage of banks relating to the presentment of checks for payment. It is sufficient diligence to charge an indorser if a check on a bank in another place is forwarded through various banks for collection in accordance with the regular usage of the business, although presentment might have been more promptly made if a more direct course had been taken. *Plover Sav. Bank v. Moodie*, 135 Iowa 685, 110 N. W. 29, S. C., petition for rehearing overruled, 113 N. W. 476. See also *Citizens' Bank v. First Nat. Bank*, *infra*, sec. 186. See *Gordon v. Levine*, *infra*, sec. 186, as to time of presentment where the drawer, payee, and drawee bank are all in the same place.

This section changes the law as to bills of exchange payable on demand, and under this section only the time intervening between the last negotiation and the presentment need be considered. Hence, where a draft was sold by a Wisconsin bank to defendant (payee) on June 10th, and he indorsed and sent it on June 16th to A at Spokane while he was on his way to San Francisco, and A upon arrival there on July 14th sold the draft to plaintiff bank, which sent it at once to a Chicago bank, which presented it July 18th to the drawee bank there, which refused payment, and due protest was then made, it was held that the delay between the date and the negotiation of the draft to plaintiff bank was immaterial, and that the draft was presented in time to hold the defendant on his indorsement. *Columbian Banking Co. v. Bowen*, 134 Wis. 213, 114 N. W. 451, S. C. sec. 72-2.

The principle established in this case would seem to continue the liability of the drawer and indorsers of a bill payable on demand

for an indefinite time, limited only by the Statute of Limitations, provided only that the bill is presented for payment within a reasonable time after its last negotiation, no matter how long this may be after the drawing or indorsement.

Moreover, by the combined effects of sections 185 and 186 if a check had not been presented within a reasonable time *after its issue* and the drawee bank had failed in the meantime, the drawer would be discharged to the extent of the loss caused by such delay.

Whereas, if said presentment was within a reasonable time after the last negotiation of the check, the indorser would be held without any recourse against the drawer except as to such dividend as the insolvent bank might be able to pay, a most unjust result. These unfortunate consequences might have been avoided by adopting the corresponding provision of the B. E. A. (sec. 45 (2) *supra*, p. 89 n. 65), under which the drawer is discharged unless presentment is made within a reasonable time after the issue of the bill, and the indorser unless it is presented within a reasonable time after his indorsement.

SEC. 72. Presentment for payment, to be sufficient, must be made,—

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;(a)
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.⁶⁶

Nelson v. Grondahl, 13 N. Dak. 363, 100 N. W. 1093, S. C. sec. 73; German-American Bank v. Milliman, 31 Misc. R. 87, 65 N. Y. Supp. 242, S. C. sec. 75; Gilpin v. Savage, 60 Misc. Rep. 605, 112 N. Y. Supp. 802, S. C. secs. 73, 74.

(a) This provision has reference to the general custom at the place of the particular transaction. So when presentment was made to a Chicago bank between 3 and 6 o'clock and the business day of banks continued after the closing of clearing-house transactions so as to enable banks holding paper for collection to present such as had been refused recognition in the clearings such pre-

⁶⁶ "Either to the person designated by the bill as payee or to some person authorized to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found." B. E. A. s. 45 (3).

sentment was within reasonable hours on a business day. *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451, S. C. sec. 71.

In case of presentment in a foreign jurisdiction what constitutes reasonable hours of a business day there is a matter of proof. *Ib.*

A notarial certificate of protest showing due presentment raises a presumption that presentment was made at a proper time. *Ib.*

SEC. 73. Presentment for payment is made at the proper place,—

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;⁶⁷
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

German-American Bank v. Milliman, 31 Misc. R. 87, 65 N. Y. Supp. 242, S. C. sec. 75; *Congress Brewing Co. v. Habenicht*, 83 App. Div. 141, 82 N. Y. Supp. 481, S. C. sec. 82-3; *Smith v. Shippers' Oil Co.*, 120 La. 640, 45 So. 533.

A note payable at a bank is properly presented for payment at the bank although the bank is in the hands of a receiver and closed. Presentment need not be made to the receiver personally, he having no authority to pay. *Schlesinger v. Schultz*, 110 App. Div. 356, 96 N. Y. Supp. 383, S. C. secs. 7-1, 71.

Where a note is payable at a certain store, presentment for payment at such store to a person connected therewith is sufficient and no personal demand on the maker is necessary. *Nelson v. Grondahl*, 13 N. D. 363, 100 N. W. 1093.

⁶⁷ "Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence if known." B. E. A. s. 45 (4) (c).

Where a note is payable at a designated branch of a trust company, presentation at the principal office of the company on the date of maturity and at the branch after banking hours on the day following is not sufficient as against an indorser. *Ironclad Mfg. Co. v. Sackin*, 129 App. Div. 555, 114 N. Y. Supp. 43.

A note was made payable at the home of the maker and at maturity he was called up by telephone and asked what he was going to do about it, and answered that he could not pay, and was told that the note would be protested. Held, that the right of the maker under section 74 to the exhibition of the note was waived, and that the demand over the telephone was a sufficient presentment to charge the indorser. *Gilpin v. Savage*, 60 Misc. Rep. 605, 112 N. Y. Supp. 802.

SEC. 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

Congress Brewing Co. v. Habenicht, 83 App. Div. 141, 82 N. Y. Supp. 481, S. C. sec. 82-3.

In an action on a demand note against the maker it is not necessary to allege a demand for payment or that the note was exhibited to the maker. The note was due at the time of delivery, and demand is presumed to have been then made, and this is true even though the note bears interest. *Church v. Stevens*, 56 Misc. R. 572, 107 N. Y. Supp. 310.

The right of the maker to the exhibition of the note may be waived. *Gilpin v. Savage*, 60 Misc. Rep. 605, 112 N. Y. Supp. 802, S. C. sec. 73.

SEC. 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.⁶⁸

The Nebraska Act omits everything after the words "banking hours" in line three.

⁶⁸ Not in B. E. A.

The person to make payment has until the close of banking hours of the bank where the instrument is made payable in which to pay it, and if before the close of such hours he deposits money enough to pay it, a demand earlier in the day is premature. *German-American Bank v. Milliman*, 31 Misc. R. 87, 65 N. Y. Supp. 242.

SEC. 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

Calling two or three times at the banking office of the administrator of a deceased maker, and again seeking him at a railroad station near the seat of his other business interests at a time when he might be expected to be there, warrants a finding of reasonable diligence to present a note for payment. *Reed v. Spear*, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 89, 96.

SEC. 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.⁶⁹

SEC. 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

SEC. 79. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

West Branch Bank v. Haines, 135 Iowa, 313, 112 N. W. 552; *In re Swift*, 106 Fed. Rep. 65, S. C. secs. 64-1, 82-3.

⁶⁹ Not in B. E. A., except inferentially from s. 45 (6), which is the same as N. I. L. s. 78.

SEC. 80. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.

The Illinois Act omits everything after the words "for his accommodation."

McDonald v. Luckenbach, 170 Fed. 434, 95 C. C. A. 604. S. C. sec. 63.

SEC. 81 Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925, S. C. sec. 186.

SEC 82. Presentment for payment is dispensed with:—

1. Where after the exercise of reasonable diligence presentment as required by this act can not be made;⁷⁰
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.(a)

Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 89, 96; Gilpin v. Savage, 60 Misc. Rep. 605, 112 N. Y. Supp. 802, S. C. secs. 73, 74; Jordan v. Reed (N. J.), 71 Atl. 280, S. C. sec. 115.

⁷⁰ The English Act adds: "The fact that the holder has reason to believe that the bill will, on presentment, be dishonored does not dispense with the necessity for presentment." B. E. A. s. 46 (2) (a).

(a) The facts excusing presentment or failure to give notice of dishonor or a waiver thereof must be specially pleaded. Proof thereof is not otherwise admissible. *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113, S. C. sec. 70.

To bind the indorser, his waiver must be with knowledge of the facts which release him, but ignorance as to their legal effect will not relieve him in the absence of fraud. *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455, S. C. sec. 64-1. This case was again heard by the Supreme Judicial Court upon exceptions taken at a second trial, when it was further held that while a written waiver of demand made without limitation after the time for demand has expired can not, as a general rule, be limited by oral evidence, yet such evidence is competent to show fraud, mistake, or circumstances to aid the court to ascertain the construction of the agreement. So where on a demand note an indorsement was made more than sixty days after its date (see *Merritt v. Jackson, infra*, sec. 193), waiving "demand, notice, and protest," evidence was admissible to show whether this waiver referred to a protest within said sixty days or to a further protest, and that it was for the jury to say upon the evidence which of these two protests was the subject matter of the agreement, and that their finding for the indorser was conclusive. *Toole v. Crafts*, 196 Mass. 397, 82 N. E. 22.

Defendant, the president of a corporation, indorsed its note. Before maturity, the maker was adjudged a bankrupt partly upon the written admission of defendant of its inability to pay its debts with a willingness that it be adjudged a bankrupt. Held, that defendant had waived presentment and notice of dishonor. *J. W. O'Bannon Co. v. Curran*, 129 App. Div. 90, 113 N. Y. Supp. 359.

Where the indorsers of a note, payable at a bank, had assured the holder that it could not be paid at maturity and knew that the maker, a corporation, had not the money to pay it, they were not discharged by failure to present the note for payment. *Bessenger v. Wenzel* (Mich.), 125 N. W. 750.

A firm made a note which was indorsed by one of the partners prior to its delivery. Shortly before maturity of the note the indorser, during a consultation with the holder regarding a general assignment of the firm and the partners, which was thereafter made as a result of the conference, told the holder that neither the firm nor he could pay the note at maturity, and the holder therefore made no presentment for payment and gave no notice of non-payment. Held, that both by the law merchant and under the statute there was an implied waiver of presentment, and that under sec. 115-2 notice of dishonor was not required. *In re Swift*, 106 Fed. Rep. 65, S. C. sec. 64-1.

Evidence of assurances by the indorser to the indorsee when indorsing and delivering a note that the former would be responsible for principal and interest when due, and would look after the collection of the note and pay interest when it became due, is competent to show a waiver by declarations of the indorser cal-

culated to mislead the indorsee and induce him to omit presentment and notice of dishonor. *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145.

Defendant was an accommodation indorser of a demand note payable to plaintiff and given as security for debts which the maker might contract with plaintiff. Defendant reserved the right to withdraw his indorsement after four months upon payment of such debts to the amount of the note. Within four months plaintiff informed defendant of the amount due him from the maker, and defendant said that he would see the maker and if he did not pay "would go and shut him up." Held, these facts did not excuse presentment and notice of dishonor. *Congress Brewing Co. v. Habenicht*, 83 App. Div. 141, 82 N. Y. Supp. 481.

The drawer, being ignorant that the bill had not been presented for payment, accepted notice of non-payment. Held, that he had not waived presentment. *Keith v. Burke*, 1 Cababe & Ellis, 551.

SEC. 83. The instrument is dishonored by non-payment when,—

1. It is duly presented for payment and payment is refused or can not be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; *Reed v. Spear*, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 89, 96; *German-American Bank v. Milliman*, 31 Misc. R. 87, 65 N. Y. Supp. 242, S. C. sec. 75.

SEC. 84. Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

German-American Bank v. Milliman, 31 Misc. R. 87, 65 N. Y. Supp. 242, S. C. sec. 75; *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; *Bacigalupo v. Parrilli*, 112 N. Y. Supp. 1040, S. C. sec. 89; *Gilpin v. Savage*, 60 Misc. Rep. 605, 112 N. Y. Supp. 802, S. C. secs. 73, 74; *Kennedy v. Thomas*, [1894] 2 Q. B. 759, S. C. sec. 85.

SEC. 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of

maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.⁷¹

In Massachusetts this section was amended (Laws 1899, c. 130), as follows: "On all drafts and bills of exchange made payable within this Commonwealth at sight, three days of grace shall be allowed, unless there is an express stipulation therefor to the contrary."

The New Hampshire Act makes the same provision.

The North Carolina Act (Revisal of 1908, sections 2234, 2235), provides that every negotiable instrument is payable at the time fixed therein without grace except that "all bills of exchange payable within the State, at sight, in which there is an express stipulation to that effect, and not otherwise, shall be entitled to days of grace as the same are allowed by the customs of merchants in foreign bills of exchange, payable at the expiration of a certain period after date on sight; provided, that no days of grace shall be allowed on any bill of exchange, promissory note or draft payable on demand."

The Arizona, Kentucky and Wisconsin Acts omit altogether the third sentence beginning "Instruments falling due."

In the Colorado Act the following words are substituted: "Instruments falling due on any day, in any place where any part of such day is a holiday, are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for

⁷¹ "Where a bill is not payable on demand, the day on which it falls due is determined as follows: (1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that (a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day. (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day." B. E. A. s. 14 (1).

payment during reasonable hours of the part of such day which is not a holiday."

In the Kansas, Missouri (by amendment in 1907), and New York Acts (by amendment in 1898), the words "or becoming payable" were inserted after the words "falling due" in the third sentence.

In the Massachusetts Act (by amendment in 1902), the words "or payable" were inserted after "falling due."

The New Hampshire Act makes the same insertion.

The insertion of the words "becoming payable" or "or payable," seems unnecessary and to make no difference in the legal effect of the provision.

The third sentence of this section presents the anomaly that while an instrument falling due on Saturday must be presented on Monday in order to hold drawers and indorsers, yet if the instrument is payable at a special place and the person primarily liable is able and willing to pay it there at maturity (see section 70), it must be presented on Saturday in order to charge the parties liable for such payment with interest after Saturday. This question has arisen in a practical way in Boston, and counsel for both parties agreed upon this construction of the sentence, but the question has not been submitted to a court. It seems also that if a bank or other collecting agent should fail to present the instrument on Saturday, such agent might be chargeable with negligence and liable for any loss thereby caused to the principal. Discussion of these questions by the Clearing House Committee of Boston led to the adoption (Massachusetts Laws, 1910, chap. 417) of the following amendment, applicable to instruments made after its enactment:

"When the day of maturity falls upon Saturday, Sunday, or a holiday, the instrument is payable on the next succeeding business day which is not a Saturday. Instruments payable on demand may at the option of the holder be presented for payment before 12 o'clock noon on Saturday, when that entire day is not a holiday, provided, however, that no person receiving any check, draft, bill of exchange, or promissory note payable on demand shall be deemed guilty of any neglect or omission of duty or incur any liability for not presenting for payment or acceptance or collection such check, draft, bill of exchange or promissory note on a Saturday; provided, also, that the same shall be duly presented for payment or acceptance or collection on the next succeeding business day."

See for a fuller discussion of these questions an article by Professor Williston in 23 Harvard Law Rev. 603.

The Iowa Act adopts section 85, but also by a subsequent section makes this additional provision:

"Section 198. DAYS OF GRACE—*demand made on.* A demand made on any one of the three days following the day of maturity,

of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this act, and the provisions of this act as to notice of non-payment, non-acceptance, and as to protest shall be applicable with reference to such demand as though the demand were made in accordance with the terms of this act; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face."

The title of this section is a misnomer for it simply permits the holder to make demand not only on the day of maturity, but on any of the three following days except a Sunday or a holiday. The "grace" is to the holder, not to the acceptor or maker. And the same ambiguities and uncertainties arise here as under section 85; namely, whether if an instrument payable at a special place where the acceptor or maker is able and willing to pay, is not presented on the day of maturity, the acceptor or maker will be liable for interest for the three following so-called days of grace.

Also whether an agent for collection of such an instrument failing to make presentment on the day of maturity, whereby loss results, will not be chargeable with negligence, although presentment is made within three days following the day of maturity.

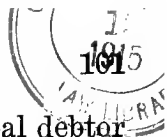
In the absence of evidence to the contrary the presumption is that the common law which allowed days of grace still remains the law of a sister State. *Demelman v. Brazier*, 193 Mass. 588, 79 N. E. 812. The N. I. L. was in force in the sister State (New York) at the time, but that fact was not shown.

A bill is dishonored by the refusal of the acceptor to pay at any time on the last day of grace, and notice of dishonor may be given at once to the drawer and indorsers. But no right of action arises until the following day. *Kennedy v. Thomas*, [1894] 2 Q. B. 759.

SEC. 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

The statutory construction laws of the respective States should be consulted in connection with this and similar sections, *e. g.*, see Consolidated Laws of New York, 1909, secs. 20, 24, 25.

SEC. 87. Where the instrument is made payable at a bank it is equivalent to an order to the bank



to pay the same for the account of the principal debtor thereon.⁷²

The Illinois and Nebraska Acts omit this section.

A bank has no authority to pay notes of a depositor made before the adoption of the Negotiable Instruments Law and payable at another bank. *Elliott v. Worcester Trust Co.*, 189 Mass. 542, 75 N. E. 944. When the depositor sues the bank, the bank can not claim the rights of a *bona fide* purchaser for value before maturity when it simply pleads a general denial and payment and files no claim in set-off. *Ib.*

SEC. 88. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

The payee of a demand note held a mortgage to secure the debt. He sold and transferred the mortgage to one person for full value and afterwards indorsed the note to a holder in due course. Held, that the note was not paid by the sale of the mortgage. *Glasscock v. Balls*, 24 Q. B. D. 13, S. C. sec. 119-1.

ARTICLE VII.

NOTICE OF DISHONOR.

SEC. 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

AMES: By section 89, if the drawer of a check is not notified of the dishonor, he will be absolutely discharged, although he has suffered no loss by the failure to give him notice. Yet by section 186 the drawer is only discharged to the extent of loss caused by delay in presentment of the check for payment within a reasonable time.

⁷² Not in B. E. A.

BREWSTER: Disputes the correctness of Professor Ames' criticism and also contends that in any event the holder could still sue on the debt.

AMES: The holder could not sue on the debt if the check had been given in absolute payment, or for the payee's release of a claim against a third person.

McKEEHAN: Agrees with Professor Ames that the provisions of the section are inaccurate, but the fact that they have proved satisfactory in the English Act for twenty years, indicates that little or no harm will result from the inaccuracy.

Fonseca v. Hartman, 84 N. Y. Supp. 131, S. C. sec. 108; *American Exch. Nat. Bank v. Am. Hotel Victoria Co.*, 103 App. Div. 372, 92 N. Y. Supp. 1006, S. C. 97; *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113, S. C. sec. 70; *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847, S. C. secs. 64-1, 120-6; *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; *Ebling Brewing Co. v. Reinheimer*, 32 Misc. R. 594, 66 N. Y. Supp. 458, S. C. sec. 108; *Fritts v. Kirchdorfer* (Ky.), 124 S. W. 882; *Studebaker Bros. Co. v. Fuerther*, 123 N. Y. Supp. 118.

Where notice of dishonor to the drawer of a check is required it must be alleged in the complaint. *Ewald v. Faulhaber Co.*, 105 N. Y. Supp. 114.

But this is not necessary if the drawer had countermanded payment; and the complaint may be amended so as to conform to proof of such fact. *Scanlon v. Wallach*, 53 Misc. R. 104, 102 N. Y. Supp. 1090.

Judgment for the payees of a check against the drawer can not be sustained in the absence of proof that notice of dishonor was given to the drawer. *Kufiek v. Glasser*, 114 N. Y. Supp. 870.

The drawer of a check is discharged by failure to give him notice of dishonor, the bank refusing to pay because it was short of funds, and subsequently proving to be insolvent. *Bacigalupo v. Parrilli*, 112 N. Y. Supp. 1040. It does not appear in the report of this case whether the bank paid any dividend or not.

The foregoing cases show that the danger apprehended by Professor Ames in his criticism on this section is a real one.

Plaintiff must allege that notice of dishonor was given to the indorser of a note, or that it was waived. An allegation that the note was duly protested is not enough. The N. I. L. was not cited. *Wisdom & Levy v. Bille*, 120 La. 700, 45 So. 554.

Where a statute authorized suit on a note by motion and notice, the notice must state a cause of action, and in a suit against an indorser it must show that the note was protested or notice of dishonor given. *Security Loan & Trust Co. v. Fields* (Va.), 67 S. E. 342. The N. I. L. was not cited in this case.

In an action against the indorser of a note it is not sufficient to allege that upon maturity the note was duly presented for pay-

ment, and the indorser duly notified of non-payment. The allegation and the evidence must show the demand and notice to have been upon such a day as will charge the defendant. The *N. I. L.* was not cited on this point. *Hoyland v. National Bank of Middlesborough* (Ky.), 126 S. W. 356. *Sed quare*, whether this is not too technical? See next case.

An allegation that due notice of the protest of a note was duly given to an indorser is a sufficient allegation of notice of dishonor; the term "protest" including in a popular sense all the steps taken to fix the liability of an indorser, and the word "duly," in legal parlance, meaning "according to law," and relating not to form only, but including both form and substance. *Sherman v. Ecker*, 59 Misc. Rep. 216, 110 N. Y. Supp. 265.

Failure to notify an indorser of an installment note of the non-payment of previous installments does not affect his liability for later installments of the non-payment of which he has been duly notified. *Hopkins v. Merrill*, 79 Conn. 626, 66 Atl. 174, S. C. sec. 66. The note did not appear to contain an option to declare the whole sum due for non-payment of any installment. Cf. *Galbraith v. Shepard*, *supra*, sec. 70.

A joint maker, though a surety, is not an indorser and is primarily liable, and, therefore, is not entitled to notice of dishonor. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875.

Although presentment is excused because no administrator has been appointed (sec. 76), yet if the instrument is dishonored (sec. 83) notice of dishonor must be given to the indorser in compliance with sec. 89. *Reed v. Spear*, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 96.

An action against an indorser after legal notice of dishonor is not barred because judgment was rendered in his favor in a previous action solely for the reason that he had not been notified before that action was brought. *Peck v. Easton*, 74 Conn. 456, 51 Atl. 134, S. C. sec. 64-1.

SEC. 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.⁷³

⁷³ "The notice must be given by or on behalf of the holder or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill." B. E. A. s. 49 (1).

Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768, S. C. sec. 91; First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4.

SEC. 91. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4.

A note made by A to the order of B, indorsed by B and also by A, was protested for non-payment. Notice addressed to B was sent to A, who forwarded it to B. Held, that although A could not give notice in his own behalf to B under sec. 90, since B. was presumptively an accommodation indorser for A and not liable, yet A could forward it to B, on behalf of the holder, and as his agent. Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768.

SEC. 92. Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768, S. C. sec. 91.

SEC. 93. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

SEC. 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

A branch of a country banking company sent to a London bank for collection a bill bearing several indorsements. Upon dishonor the London bank sent notice by post on the next day to another branch of the forwarding bank. The next day notice was sent by telegraph to the right branch, and the subsequent notices of dishonor to other parties were given in due time. Held, that sufficient notice of dishonor was given and the first indorser was liable. *Fielding v. Corry* [1898] 1 Q. B. 268

SEC. 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

The Kentucky Act omits the word "not" in the first line, and substitutes "written" for "verbal" in the third line.

Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664

Where the notice of protest described the note correctly and the envelope was correctly addressed and was received and opened by the indorser, the notice was sufficient, although the notice was on its face by mistake addressed to the maker. *Wilson v. Peck*, 121 N. Y. Supp. 344, S. C. secs. 103-3, 106. But it was held otherwise where both the notice and the envelope containing it were addressed to another party. *Marshall v. Sonneman*, 216 Pa. 65, 64 Atl. 874, S. C. sec. 97, in which case the N. I. L. was not cited

SEC. 96. The notice may be in writing or merely oral⁷⁴ and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.⁷⁵

American Exch. Nat. Bank v. Am. Hotel Victoria Co., 103 App. Div. 372, 92 N. Y. Supp. 1006; S. C. sec. 97; *Second Nat. Bank*

⁷⁴ The English Act reads "by personal communication" instead of "merely oral." B. E. A. s. 49 (5).

⁷⁵ The words "or through the mails" are omitted in B. E. A. s. 49 (5), but the provision may be implied from s. 49 (15), which is the same as N. I. L. s. 105.

v. Smith, 118 Wis. 18, 94 N. W. 664; Scarbrough v. City Nat. Bank, 157 Ala. 577, 48 So. 62.

After several efforts to find an indorser, notice of the dishonor was delivered at his store to his wife, who acted as his assistant. Held, a sufficient service, especially when the indorser actually received the notice upon the same day. Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 89.

The certificate of protest being (by statute) *prima facie* evidence of the facts therein stated, the burden is on the indorser to show that he did not receive notice either personally or through the mails, where the certificate alleges that he was duly notified of dishonor.

A notice which contained a copy of the note and declared that payment had been demanded and refused, is sufficient. Marshall v. Sonneman, 216 Pa. 65, 64 Atl. 874, *infra*, S. C. sec. 97, distinguished. Zollner v. Moffitt, 222 Pa. 644, 72 Atl. 285.

SEC. 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Mohlman Co. v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046, S. C. sec. 108; Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007; S. C. secs. 76, 89, 96.

Leaving the notice at the window of the cashier of a hotel corporation is not sufficient service, it not appearing that any one's attention was drawn to the notice, or that any one was present, and the president and managers having testified that it was not brought to their attention. Am. Exch. Nat. Bank v. Am. Hotel Victoria Co., 103 App. Div. 372, 92 N. Y. Supp. 1006.

Both the notice of dishonor and the envelope containing it were addressed to the second indorser and delivered by a notary public to the first indorser. Held, that this did not fix the liability of the first indorser, even though he read the notice; it did not inform him that he was looked to for payment. The N. I. L. was not cited. Marshall v. Sonneman, 216 Pa. 65, 64 Atl. 874.

Cf. Wilson v. Peck, 121 N. Y. Supp. 344, S. C. secs. 95, 193-3, 106.

SEC. 98. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.⁷⁶

⁷⁶ The provision in the last paragraph is not in B. E. A.; sec. s. 49 (9).

Notice to the representative of a deceased indorser of a note, made and payable in Canada, must be given in accordance with the laws of Canada, although the indorser's residence has been in New York. *Merchants' Bank v. Brown*, 86 App. Div. 599, 83 N. Y. Supp. 1037.

SEC. 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.⁷⁷

Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768, S. C. sec. 91; *Feigenspan v. McDonnell* 201 Mass. 341, 87 N. E. 624.

SEC. 100. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

SEC. 101. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.⁷⁸

SEC. 102. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.⁷⁹

⁷⁷ Not in B. E. A., except inferentially from section 49 (11), which is substantially the same as N. I. L. s. 100.

⁷⁸ Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee. B. E. A. s. 49 (10).

⁷⁹ "Notice may be given as soon as the bill is dishonored and must be given within a reasonable time thereafter. In the absence of special circumstances, notice is not deemed to have been given within a reasonable time unless (a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonor of the bill. (b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonor of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter." B. E. A. s. 49 (12) (a), (b).

German-American Bank v. Milliman, 31 Misc. R. 87, 65 N. Y. Supp. 242, S. C. sec. 75.

SEC. 103. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:--

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.⁸⁰(a)

Jurgens v. Wichmann, 124 App. Dis. 531, 108 N. Y. Supp. 881, S. C. sec. 107.

Notice given "two or three days after the note was due" is too late. Solomon v. Cohen, 94 N. Y. Supp. 502.

Siegel v. Dubinsky, 56 Misc. Rep. 681, 107 N. Y. Supp. 678.

(a) A notice placed in a mail chute on the day of protest, but not postmarked until the next day at noon, is mailed in time and it will be presumed, in the absence of evidence to the contrary, that the notice reached its destination by 5 o'clock, which would be before the close of business hours, both parties residing in Manhattan. The indorser swore that he did not get the notice until the following day, but did not testify that he was at his office on the day it was mailed. This was not enough to show that the notice was not received in time. Wilson v. Peek (Misc. Rep.), 121 N. Y. Supp. 344, S. C. secs. 95, 106.

SEC. 104. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:—

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following

⁸⁰ See note 79 to section 102, *supra*, p. 107.

the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.⁸¹

2. If given otherwise than through the post-office, then within the time that notice would have been recived in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.⁸²

Mohlman Co. v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046, S. C. sec. 108; Jurgens v. Wichmann, 124 App. Div. 531, 108 N. Y. Supp. 881, S. C. sec. 107.

Departure time for the mail the day after dishonor was between 9 and 10 o'clock A. M. This was a convenient time and deposit on the evening of that day after the closing of the mail for that day was too late. Even if this were not so, a failure to prepay sufficient postage and to remedy the mistake after knowledge thereof for five days released the indorser beyond any possible question. First Nat. Bank of Shawano v. Miller, 139 Wis. 126, 120 N. W. 820, S. C. sec. 2-5.

SEC. 105. Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

State Bank v. Solomon, 84 N. Y. Supp. 976; Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624.

Although non-receipt of a duly mailed notice of dishonor does not discharge an indorser, evidence of such non-receipt is competent on the question whether the notice was actually mailed. Union Bank of Brooklyn v. Deshel (App. Div.), 123 N. Y. Supp. 585.

SEC. 106. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.⁸³

Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624.

⁸¹ See note 79 to section 102, *supra*, p. 107.

⁸² Not in B. E. A.

⁸³ Not in B. E. A.

Deposit of a note of protest in a mail chute under the control of the postoffice is sufficient. *Wilson v. Peck* (Misc. Rep.), 121 N. Y. Supp. 344, S. C. sec. 95, 103-3.

SEC. 107. Where a party receives⁸⁴ notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

When the answer alleges that the indorser had no notice of dishonor, the burden is on the holder to show that due notice was given. It is not shown by testimony of a notary that, not knowing the address of the indorser, he inclosed the notice of dishonor to a subsequent indorser with postage for forwarding the notice to the prior indorser. *Fuller Buggy Co. v. Waldron*, 112 App. Div. 814, 99 N. Y. Supp. 920. The N. I. L. was not cited in this case.

Plaintiff indorsed and deposited a check for collection in bank on the 28th. On the 29th he was notified of the dishonor of the check, and on the 30th he notified the defendant indorser by telegraph. Held, that the notice was in due time. *Jurgens v. Wichmann*, 124 App. Div. 531, 108 N. Y. Supp. 881.

SEC. 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:⁸⁵—

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters;⁸⁵ or
2. If he live in one place, and have his place of business in another, notice may be sent to either place;⁸⁵ or
3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.⁸⁵

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.⁸⁵

⁸⁴ The English Act interpolates "due." B. E. A. s. 49 (14).

⁸⁵ Not in B. E. A.

Albany Trust Co. v. Frothingham, 50 Misc. R. 598, 99 N. Y. Supp. 343.

Notice of protest addressed merely "C. H., N. Y.," is not sufficient where there is no evidence that the indorser lived or ever had lived, or was sojourning in New York, or that any inquiry was made to ascertain the fact. Fonseca v. Hartman, 84 N. Y. Supp. 131.

The indorser lived at the place where the note was dated, but moved from said place at some time not stated. Held, that notice of dishonor mailed to said place was sufficient, the court assuming that there had been no change of residence up to that time. Mohlman v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046.

Notice to an indorser, who has added no address to his signature, mailed to the postoffice of his place of residence is good, but not if addressed to a house where the indorser does not reside or do business or receive his letters, even though he owned the house and his sons did business there. Ebling Brewing Co. v. Reinheimer, 32 N. Y. Misc. R. 594, 66 N. Y. Supp. 458.

Where a notary inquired of several persons as to the postoffice address of an indorser, all of whom seemed to have some information and stated their belief that a certain town was the nearest town to the farm where the indorser lived, and a much larger place than the town where the indorser actually received his mail, a notice of dishonor sent to such nearest town was sufficient, although the indorser did not receive it within a reasonable time. Vogel v. Starr, 132 Mo. App. 430, 112 S. W. 27. The N. I. L. was not cited in this case.

Plaintiff, the payee of a dishonored note, knew that the defendant indorser lived in New York City, but claimed that he did not know his address. Defendant testified that plaintiff had frequently corresponded with defendant at his New York address. The notice of dishonor was mailed to defendant in the care of the maker, but not delivered to defendant. Held, that this was not sufficient notice, and that defendant was discharged. E. I. Dupont, etc., Powder Co. v. Rooney, 63 Misc. Rep. 344, 117 N. Y. Supp. 220.

SEC. 109. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

Torbert v. Montague, 38 Colo. 325, 87 Pac. 1145, S. C. sec. 82-3; Galbraith v. Shepard, 43 Wash. 698, 86 Pac. 1113, S. C. secs. 70, 82-3; Congress Brewing Co. v. Habenicht, 83 App. Div. 141, 82 N. Y. Supp. 481, S. C. sec. 82-3; J. W. O'Bannon Co. v. Curran, 129 App. Div. 90, 113 N. Y. Supp. 359, S. C. sec. 82-3; Security Loan & Trust Co. v. Fields (Va.), 67 S. E. 342, S. C. sec. 89; Jordan v. Reed (N. J.), 71 Atl. 280, S. C. sec. 115.

If presentment for payment be waived (see secs. 82 and 83) notice of dishonor is dispensed with. *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886, S. C. sec. 64-1.

Defendant was one of several payees and indorsers of a note. Some days before its maturity defendant indorsed a renewal note having also several payees. The maker struck out the name of one of the payees in the renewal note and substituted his own name as payee, and several days after maturity of the original note took it up by the renewal note. Held, that defendant had not waived notice of dishonor of the original note and was not liable on it. *First Nat. Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 119-4.

A mere oral promise to renew a note, made after its maturity by an accommodation indorser, is not a waiver of the failure to give notice of dishonor; such promise is not an acknowledgment of liability. *Mechanics' and Farmers' Savings Bank v. Katterjohn* (Ky.), 125 S. W. 1071, S. C. secs. 63, 196.

Plaintiff, an indorser of a check deposited by him with defendant bank, was not given due notice of its dishonor. With knowledge thereof, plaintiff gave his own check for the dishonored check and sued defendant for its failure to give him due notice of such dishonor. Held, that plaintiff had waived the bank's laches and could not recover. *Weil v. Corn Exchange Bank*, 63 Misc. Rep. 300, 116 N. Y. Supp. 665. *Quaere*, whether section 109 has any application to the case. See dissenting opinion of Lehman, J.

A bill was drawn by the A Company to its own order on the B Company and accepted and indorsed to the C Company. All three companies knew that the bill would be dishonored. No notice of dishonor was given to the drawer, because the secretary of the C Company, who was also secretary of the other two companies, knew it never was intended to make the drawer liable. Held, that it was not the duty of the secretary of the C Company to communicate his knowledge of the dishonor to the drawer, that his knowledge was therefore not notice to the drawer, and that the latter was discharged. *In re Fenwick*, [1902] 1 Ch. 507.

SEC. 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.⁸⁶

SEC. 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a

⁸⁶ Not in B. E. A.

formal protest, but also of presentment and notice of dishonor.⁸⁷

Bank of Montpelier v. Montpelier Lumber Co. (Idaho), 102 Pac. 685.

SEC. 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged.

Fonseca v. Hartman, 84 N. Y. Supp. 131, S. C. sec. 108.

Reasonable diligence depends upon the circumstances of the case, and is a question for the jury. Brewster v. Shrader, 26 Misc. R. 480, 57 N. Y. Supp. 606, S. C. sec. 25.

Failure, after the exercise of reasonable diligence, to find the drawer of a dishonored bill at the address given by him, does not dispense with notice if an address at which he is to be found comes to the holder's knowledge before action brought. Studdy v. Beesty, 60 T. L. Rep. 647.

SEC. 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder,⁸⁸ and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Delay in giving notice of dishonor caused by the necessity of making inquiries as to the address of the party to be notified is excusable, the holder being ignorant of the address. The Elmville, [1904] P. 319.

SEC. 114. Notice of dishonor is not required to be given to the drawer in either of the following cases:—

1. Where the drawer and drawee are the same person;

⁸⁷ Not in B.

⁸⁸ B. E. A. s. 50 (1) uses "party giving notice" instead of "holder."

2. When the drawee is a fictitious person or a person not having capacity to contract;
3. When the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;⁸⁹
5. Where the drawer has countermanded payment.

Scanlon v. Wallach, 53 Misc. R. 104, 102 N. Y. Supp. 1090, S. C. sec. 89.

Defendant gave a check which was duly presented to the drawee bank and dishonored, for what reason did not appear. Notice of dishonor was not given to defendant for fourteen days thereafter. Held, that the failure to give notice is dispensed with only under defined circumstances, and that the burden is on the holder of the check, or one claiming under him, to excuse the failure to give notice. Cassel v. Regierer, 114 N. Y. Supp. 601.

A complaint on a check, alleging that when it was presented for payment to the defendant, who was the drawer, he refused to pay, is not demurrable for failure to allege notice of dishonor to the defendant. Adler v. Levinson (Misc. Rep.) 120 N. Y. Supp. 67. The case does not show whether the complaint stated that presentment for payment was made to the drawee nor why it was presented to the drawer.

SEC. 115. Notice of dishonor is not required to be given to an indorser in either of the following cases:—

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

In re Swift, 106 Fed. Rep. 65, S. C. secs. 64-1, 82-3; *McDonald v. Luckenbach*, 170 Fed. Rep. 434, S. C. sec. 63, 95 C. C. A. 604.

⁸⁹ "Where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill." B. E. A. s. 50 (2) (c) (4).

Neither the receipt by defendant, with others of property of the maker of a note on an agreement to take care of the note at maturity, nor an admission that defendant, with others, was responsible for the note, will support an action against defendant alone on the ground that such receipt of property or such admission is a waiver of presentment and notice of dishonor or an excuse therefrom. *Jordan v. Reed* (N. J.), 71 Atl. 280.

A stockholder of a corporation, who endorsed, before delivery, a note made by another stockholder, to raise money for the corporation is not entitled to notice of dishonor, because the instrument was really for his benefit. *Mercantile Bank v. Busby* (Tenn.), 113 S. W. 390, S. C. *supra*, sec. 64. *Sed quære?* See *McDonald v. Luckenbach*, 170 Fed. 434, *supra*, sec. 63.

SEC. 116. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

SEC. 117. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

The Wisconsin Act adds this inconsistent provision "but this shall not be construed to revive any liability discharged by such omission." (See *Dunn v. O'Keefe*, 5 M. & S. 282.)

SEC. 118. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.), 1266, S. C. secs. 132, 137.

The mere fact of a protest is not conclusive upon the dishonor of the instrument and due notice to the indorser; other evidence is competent on these questions and they must be left to the jury. Where no formal protest is necessary, and defendant admitted having received notice of dishonor, and did not ask to have the questions of presentment and payment submitted to the jury, he was not aggrieved by the court allowing the notary to amend his certificate of protest by annexing his seal or by the admission of his certificate in evidence. *Demelman v. Brazier*, 198 Mass. 458, 84 N. E. 856, S. C. sec. 55.

ARTICLE VIII.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

SEC 119. A negotiable instrument is discharged:—

1. By payment in due course by or on behalf of the principal debtor; *(a)*
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; *(b)*
3. By the intentional cancellation thereof by the holder; ⁹⁰
4. By any other act which will discharge a simple contract for the payment of money; ⁹¹ *(c)*
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right. *(d)*

The Illinois Act omits subsection 4.

A bill drawn in Columbia and payable in New York was dishonored. Subsequently the drawee paid in New York the principal sum with interest and protest fees without prejudice to the right of the holder to recover re-exchange. In an action by the holder against the drawer, who was also drawee. Held, that re-exchange could not be recovered. *Pavenstedt v. N. Y. Life Ins. Co.*, 113 App. Div. 866, 99 N. Y. Supp. 614.

In an action by the indorsee against the maker the answer alleged that before maturity the payee delivered to the indorsee and the indorsee accepted a mortgage in full payment of the note. The evidence was conflicting as to whether the mortgage was delivered and accepted as collateral or as payment with an agreement by the indorsee to return the note to the payee. Held, that it was an error to direct a verdict for the indorsee. *Royal Bank v. Goldschmidt*, 51 Misc. R. 622, 101 N. Y. Supp. 101. *Sed quære?* The indorsee was still the holder. The note was not discharged in either event, and the maker was merely setting up the *jus tertii*, not any right of his own. See *Twelfth Ward Bank v. Brooks*, 63 App. Div. 220, 71 N. Y. Supp. 388, S. C. sec. 121.

⁹⁰ "(1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged." B. E. A. s. 63 (1).

⁹¹ Not in B. E. A.

The modes of discharge of a person primarily liable mentioned in this section are exclusive. Hence a plea that one of the makers to the knowledge of the payee-holder signed a note as surety only and had been discharged by an extension of time by the payee to the principal debtor is bad. *Vanderford v. Farmers' Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.), 129, S. C. sec. 120-6. An accommodating maker who places the word "surety" after his signature is not discharged by an extension of time given without his consent to the co-maker. *Cellers v. Meachem*, 49 Oregon 186, 89 Pac. 426, 10 L. R. A. (N. S.), 133. So also where time was given to an accommodated payee by a holder, with knowledge of the accommodation, it was held that the accommodating maker was not discharged. *National Citizens' Bank v. Toplitz*, 81 App. Div. 593, 81 N. Y. Supp. 422. See also *infra*, sec. 192.

Wolstenholme v. Smith, 34 Utah 300, 97 Pac. 329; *Richards v. Market Exchange Bank Co.* (Ohio) 90 N. E. 1000, S. C. sec. 124; *Bradley Engineering Co. v. Heyburn* (Wash.), 106 Pac. 170, S. C. sec. 29; *Fritts v. Kirchdorfer* (Ky.), 124 S. W. 882, *semble*, accord.

It is submitted that the decisions in these cases are at variance with well established doctrines of suretyship. (See *infra*, p. 176, n. 2), and are not required by the provisions of sections 119 and 120. The discharge of a party, who, though primarily liable, is known to the holder to be a surety, by giving time to the principal debtor seems to be covered by section 119-4. But if this is not so, then, since the discharge of a surety-maker or surety-acceptor by an extension of time granted to the principal by a holder with knowledge of the relation, is neither a discharge of the instrument nor a discharge of a party secondarily liable, this must be regarded as an omitted case and, therefore, to be governed by the law merchant under section 196.

That the rights of a surety do not depend on the form of the instrument, and that an acceptor or maker may be shown to have signed for the accommodation of a drawer or indorser and is therefore to be treated as a surety as against a holder with notice, see *Chalmers, Bills of Exchange*, 7th Ed. 241 *et seq.* And that these decisions have not met with favor see criticisms by Professor Street,¹ Professor McGehee,² Hon. Amasa M. Eaton,³ and H. H. McMahon.⁴ But they seem to be approved by Mr. Crawford.⁵

A distinction was made in *Fullerton Lumber Co. v. Snouffer*, 139 Iowa, 176, 117 N. W. 50, where it was held, that under section 58, providing that "in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same de-

¹ 11 Law Notes, 105.

² 12 Law Notes, 122.

³ Reports of American Bar Association 1907, p. 1164.

⁴ 8 Ohio Law Reporter, 25

⁵ Negotiable Instruments Law, 3rd Ed. 140.

fenses as if it were non-negotiable," a maker, known to the payee to be a surety, was discharged by an extension given to the principal maker without the consent of the surety, the court considering the provisions of sections 119 and 120 as applicable only to holders in due course.

(a) *Comstock v. Buckley* (Wis.), 124 N. W. 414, S. C. secs. 29, 58.

The receipt from an insolvent corporation of a preferential payment of an indorsed note, contrary to the statute, is in contemplation of law no payment at all and does not release the indorser. *Perry v. Van Norden Trust Co.*, 103 N. Y. Supp. 543, *semble*; *Wright v. Gansevoort Bank*, 52 Misc. Rep. 214, 103 N. Y. Supp. 548, *semble*. The N. I. L. was not mentioned in these cases.

The payee of a demand note held a mortgage to secure the debt. He sold and transferred the mortgage to one person for full value and afterwards indorsed the note to a holder in due course. Held, that the note was not paid by the sale of the mortgage. *Glasscock v. Balls*, 24 Q. B. D. 13, S. C. sec. 88.

(b) *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931, S. C. sec. 29.

(c) AMES: Subsection 4 is a startling innovation and should be cancelled. Under it a payment before maturity will discharge the instrument, for such would be the effect as to a simple contract for the payment of money. Yet it has always been the case that if a negotiable instrument is transferred before maturity to a holder in due course the instrument is not discharged by such payment.

BREWSTER: Subsection 4 evidently relates to acts between the parties.

AMES: The subsection declares just the opposite. If a negotiable instrument is "discharged" the maker can never be charged upon it.

McKEEHAN: Professor Ames' criticism is justified. Yet it is unbelievable that this subsection will be permitted to upset the rule that declares payment before maturity to be no defense against a holder in due course, although to limit the meaning of the subsection the courts will probably be obliged to take the ground that any other interpretation would be revolutionary, unjust and absurd.

A demand note is discharged when the holder upon payment of a part surrenders the note to the maker, although the maker promised at the time to pay the balance. *Schwartzman v. Post*, 84 N. Y. Supp. 922, 94 App. Div. 474, 87 N. Y. Supp. 872.

A note is discharged when it is surrendered to the maker and cancelled by him after maturity in exchange for a renewal note,

although the maker had altered the renewal note by striking out the name of one of the payees and substituting his own name. *First Nat. Bank v. Gridley*, 112 N. Y. App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109.

(d) The plaintiff, the second indorser of a note, was requested by the defendant, the maker, on the day of maturity, to take up the note and defendant promised to pay him. Plaintiff paid the holder, but in some way defendant got possession of the note without having paid it. Held, that defendant was not a holder in his own right, that the instrument was not discharged and defendant was liable to plaintiff. *Korkemas v. Mackoud*, 131 App. Div. 728, 116 N. Y. Supp. 85.

"In his own right" is not used merely in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world.

A gave a demand note payable to B or order on the understanding that it should not be negotiated. B, however, indorsed the note for value to C. Afterwards A paid B the amount of the note. B then obtained the note from C by fraud and gave it to A. Held, that A was not a holder for value, the previous payment not being a consideration given when he received back the note, and he is still liable to C on the note. *Nash v. De Freville*, [1900] 2 Q. B. 72.

SEC. 120. A person secondarily liable on the instrument is discharged:—

1. By any act which discharges the instrument;⁹²
2. By the intentional cancellation of his signature by the holder;⁹³(a)
3. By the discharge of a prior party;⁹²(b)
4. By a valid tender of payment made by a prior party;⁹²(c)
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;⁹²(d)
6. By any agreement binding upon the holder to extend the time of payment, or to postpone

⁹² Not in B. E. A.

⁹³ "Any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged." B. E. A. 63 (2).

the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.⁹²(d)

The Illinois Act substitutes for subsection 3: "3. By a valid tender of payment made by a prior party."

The Missouri Act adds to subsection 3 "except when such discharge is had in bankruptcy proceedings."

The Wisconsin Act interpolates a new subsection as follows: "4a. By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes."

The Illinois Act adds to subsection 5 (Illinois subsection 4) the words "or unless the principal debtor be an accommodating party."

The Illinois Act substitutes in line one of subsection 6 (Illinois subsection 5) the word "an" for "any" in line one and interpolates "in favor of the principal debtor" after "agreement" in line one and interpolates "prior or subsequent" after "assent" in line four and adds "or unless the principal debtor be an accommodating party" at the end of the subsection.

The Wisconsin Act interpolates the words "prior or subsequent" after "assent" in line four of subsection 6 and adds the words "or unless he is fully indemnified" to the subsection.

The Maryland and New York Acts omit the words "unless made with the assent of the party secondarily liable, or" in subsection 6.

(a) No consideration is necessary to support a discharge by the intentional cancellation of a party's signature by the holder. *McCormick v. Shea*, 50 Misc. R. 592, 99 N. Y. Supp. 467.

(b) AMES: Subsection 3 is a mischievously revolutionary provision. Under it a discharge of the maker by the statute of limitations will discharge all indorsers; so also if a surety of a joint note dies; so if due notice should not be given to the first indorser all subsequent indorsers, although duly notified, would be discharged. Except for section 16 of the National Bankruptcy Laws the discharge in bankruptcy of a prior party would discharge an indorser. Even if the words "by the holder" were inserted, release of an accommodation maker by a holder with knowledge of the accommodation would discharge the accommodation indorser, a result shocking and contrary to all the decisions.

BREWSTER: This subsection evidently means a discharge of a prior party by the holder.

McKEEHAN: Agrees with Professor Ames. The subsection seems to mean *any discharge*: a discharge by operation of law or a discharge by the holder. If the Commissioners meant only the latter why did they not say so?

(c) Payment by a surety on an appeal bond from a judgment against the maker and prior indorsers of a note discharges a subsequent indorser, so that the surety is not subrogated to the right of the judgment creditor against said indorser. *State Bank v. Kahn*, 49 Misc. R. 500, 98 N. Y. Supp. 858.

(d) AMES: There seems to be no sufficient reason, on the one hand, for inserting in a negotiable instrument code, the doctrines of suretyship in subsections 5 and 6, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance.

But subsections 5 and 6 are also inaccurate in point of law. Under them a release or an extension of time given by the holder to an accommodating acceptor or maker would discharge the accommodated drawer or indorser, which would be inequitable and contrary to all the authorities. If these subsections are retained even in an amended form, another should be added to the effect that an accommodating acceptor or maker will be discharged if the holder with knowledge of the accommodation releases or gives time to the accommodated drawer or indorser. The authorities are almost unanimous on this point.

BREWSTER: Admits that the authorities are unanimous against the discharge of the party accommodated in the cases put by Professor Ames, but does not see how the subsections could be construed to cover such cases.

McKEEHAN: Possibly the words "principal debtor" in subsection 5 do not mean the person "primarily liable" but the person ultimately liable. But sub-section 6 evidently refers to an extension of time given to the person primarily liable. Professor Ames' illustration shows that this subsection is not wholly satisfactory, nor is subsection 5 if he is right in supposing it to apply to the person primarily liable on the instrument.

Miners' Bank v. Rogers (Mo. App.), 100 S. W. 534; *Walker v. Washington Title Ins. Co.*, 19 App. Cas. (D. C.) 575; *First Nat. Bank v. Diehl*, 218 Pa. 588, 67 Atl. 897; *Ziegfried v. Stein*, 117 N. Y. Supp. 900.

An agreement by the holder of a note not to press a suit begun against the maker while certain monthly payments continue to be made, discharges non-assenting indorsers. *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.), 847, S. C. sec. 64-1.

An offer to prove a change by the cashier of a bank holding a note, on which defendant claimed to be a surety, by altering to a later date a marginal notation of the due date made by the cashier

when the note was discounted, and making a like change in the entry as to the maturity of the note in the bank's index book of notes, was rightly refused in the absence of evidence to show that these acts of the cashier were within his authority or were ratified by the bank. *Vanderford v. Farmers' Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.), 129, S. C. sec. 119.

The negotiable quality of a promissory note, payable on or before a fixed day, is not destroyed by a provision that the maker and indorsers severally waive presentment and notice of protest, and consent that the time of payment may be extended without notice. *First Nat. Bank of Pomeroy v. Buttery*, (N. D.), 116 N. W. 341, 16 L. R. A. (N. S.), 878.

Defendant indorsed a note, payable to plaintiff, for the accommodation of the maker. Before maturity, the maker gave a series of notes, falling due weekly, and agreed that the plaintiff might hold the old notes as collateral until the new notes were paid. The old note was protested when due, and charged to the account of the maker, and the new notes were discounted, and credited to his account. Held, that this was not as a matter of law an unconditional extension releasing the indorser, but presented a question of fact whether a right to sue the indorser was reserved. Defendant could have paid the old note, and demanded the notes held by plaintiff for the debt, and proceeded at once against the maker on them. *National Park Bank v. Koehler*, 121 N. Y. Supp. 640. The N. I. L. was not cited.

A guarantor of payment of a negotiable instrument, not being by the terms of the instrument absolutely required to pay it (section 192) is only secondarily liable thereon; and an extension of time to the principal debtor without his consent operates under section 120, as under the former law, to release him from liability. *Northern State Bank v. Bellamy* (N. D.), 125 N. W. 888.

SEC 121. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:—

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid⁹⁴ by the party accommodated.

⁹⁴ The English Act interpolates "in due course." B. E. A. s. 59 (3).

Polhemus v. Prudential Corporation, 74 N. J. 570, 67 Atl. 303.

In an action by the indorsee of a promissory note against an indorser, payment by a subsequent indorser is not a defense unless defendant can show that the payment was made for him. Twelfth Ward Bank v. Brooks, 63 App. Div. 220, 71 N. Y. Supp. 388.

Payment by an anomalous indorser extinguishes the note, and neither he nor his transferee can hold the maker on the note, for the anomalous indorser had no former rights on the instrument. Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671.

SEC. 122. The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

An agreement for immediate payment of part of a promissory note is sufficient consideration for the release of a surety from obligation to pay the residue. But under section 122 N. I. L. such release must be in writing, "renunciation" being there used in the sense of "release." Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724; Pitt v. Little (Wash.), 108 Pac. 491.

A holder may covenant not to sue the maker and reserve his rights against an indorser even though the note is made by a firm and indorsed by members of the firm individually. Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 66 N. E. 410, 97 Am. St. Rep. 416.

After the death of the payee a promissory note was found enclosed in an envelope with a writing addressed to his executors stating that he wished the note cancelled in case of his death, and if the law did not allow this to notify his heirs that it was his wish and orders. Held, not a valid renunciation. Leask v. Dew, 102 App. Div. 529, 92 N. Y. Supp. 891.

The holder of a demand note, being *in articulo mortis*, instructed his nurse to write a memorandum to the effect that the note should be destroyed as soon as it could be found. Held, that this was not a renunciation within the statute, but merely an expression of an intention or desire to renounce. *In re George*, 44 Ch. D. 627.

C, the holder of a note made by B, delivered the note to X, a devisee under the will of B, and verbally renounced his rights. The real estate in X's hands was charged with payment of the

testator's debts. Held, that the note was not discharged, for although the word "maker" would probably be held to include the executor of the maker, it did not include his devisees. *Edwards v. Walters*, [1896] 2 Ch. 157.

SEC. 123. A cancellation made unintentionally, or under a mistake or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

First Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4; *McCormick v. Shea*, 50 Misc. R. 592, 99 N. Y. Supp. 467, S. C. sec. 120-2.

This section contains no matter not embraced in the title of the Act, and hence does not contravene a provision of the Constitution that no law shall embrace more than one subject, that subject to be expressed in the title. *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424, S. C. sec. 1-4.

An agent for collection, without authority, accepted from the acceptor less than the amount claimed by the holder, and allowed the acceptor to cancel his signature. The holder refused to ratify the agent's act, returned the money to the acceptor, and received back the bill. Held, that the cancellation was inoperative. *Dominion Bank v. Anderson*, 15 Sess. Cas. (1888) 408. See also *Dominion Bank v. Bank of Scotland*, 16 Sess. Cas. (1889) 1081 and S. C. affirmed [1891] A. C. 592.

SEC. 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.⁹⁵

⁹⁵ "Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor." B. E. A. s. 64 (1).

The Illinois Act interpolates "fraudulently or" (probably "and" was intended) before "materially" in line one and interpolates "by the holder" after "altered" in the second line.

The Wisconsin Act interpolates "orally or in writing" after "assented", in the fourth line.

The right, recognized by some courts, of a holder, who has innocently altered an instrument to restore it to its original condition and to recover thereon, seems to be taken away by this section.

Diamond Distilleries Co. v. Gott (Ky.), 126 S. W. 131, S. C. sec. 14; *Usef v. Herzenstein*, 65 Misc. Rep. 45, 119 N. Y. Supp. 290, S. C. sec. 7. *Johnston v. Hoover*, 139 Iowa, 143, 117 N. W. 277, S. C. sec. 14; *Pitt v. Little* (Wash.), 108 Pac. 941. *Mutual Loan Assoc. v. Lesser*, 76 App. Div. 614, 78 N. Y. Supp. 629; *Bryan v. Harr*, 21 App. D. C. 190; *Birmingham Trust Co. v. Whitney*, 95 App. Div. 280, 88 N. Y. Supp. 578; *Smith v. State Bank*, 54 Misc. R. 550, 104 N. Y. Supp. 750, S. C. sec. 29; *N. Y. Life Ins. Co. v. Martindale*, 75 Kans. 142, 88 Pac. 559, 121 Am. St. Rep. 362; *Trustees of American Bank v. McComb*, 105 Va. 473, 54 S. E. 14, S. C. secs. 25, 52, 52-1; *Nottingham v. Ackiss*, 107 Va. 63, 57 S. E. 592, 67 S. E. 351; *Merchants' Bank v. Brown*, 86 App. Div. 599, 83 N. Y. Supp. 1037; *First Nat. Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4; *Mitchell v. Reed's Ex'r*, 32 Ky. Law Rep. 683, 106 S. W. 833; *Stanley v. Davis*, 32 Ky. Law Rep. 1135, 107 S. W. 773.

Where the mere inspection of a check showed that it had been altered (in date), a purchaser cannot recover on it according to its original tenor. He can not be a holder in due course because it was not regular on its face (section 52). *Elias v. Whitney*, 50 Misc. R. 326, 98 N. Y. Supp. 667. This case reaches the same result as sec. 64 (1) of the Bills of Exchange Act, where the words "but the alteration is not apparent" are interpolated, *supra*, p. 124, n. 95.

Where the alteration is material and suspicious, it is incumbent upon the party offering it to give some evidence to explain its condition. Whether the alteration is suspicious is a question of law for the court, but when the instrument has been admitted, the question whether the alteration was made before or after delivery or with the consent of the parties is for the jury. *Ofenstein v. Bryan*, 20 App. D. C. 1; *Towles v. Tanner*, 21 App. D. C. 530; *semble*. The N. I. L. was not cited in these cases.

The proper practice when a note is offered which appears to have been altered is for the court to determine, upon inspection and in view of the state of the evidence, whether the instrument should be admitted without further proof to explain the alterations, and to the exercise of the court's sound discretion no exception lies. *Wood v. Skelley*, 196 Mass. 114, 81 N. E. 872. The N. I. L. was not cited in this case.

A note without consideration, dated and payable in Ohio, was materially altered by the maker in New York at the request of the payee after it had been indorsed by defendant in New York, and was thereafter transferred in Ohio to a holder in due course. Held, that the effect of the alteration must be determined by the law of New York (where the N. I. L. was in force), not by that of Ohio (where the N. I. L. had not yet been adopted), and that the holder in due course could recover against the defendant according to the original tenor of the note. *Colonial Nat. Bank v. Duerr*, 108 App. Div. 215, 95 N. Y. Supp. 810.

The payee of a check represented that it was lost and received another check from the drawer, and collected it, and then changed the first check by dating it ten days later, and transferred it to plaintiff, a holder in due course. Held, that the drawer's loss was not caused by delay in presentment, but by reliance on the payee's false representations, and that plaintiff could recover from the drawer of the check according to its original tenor. *Moskowitz v. Deutsch*, 46 Misc. Rep., 603, 92 N. Y. Supp. 721.

The maker of a note indorsed in blank by the payee stole it from the payee, altered it, and negotiated it to the plaintiff, a holder in due course. Held, that the plaintiff could recover against the payee-indorser according to the original tenor of the note. *Quære*, whether, after the fact of alteration had appeared, plaintiff must amend by inserting counts upon the note as originally made? *Mass. Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959, S. C. secs. 9-5, 16, 56, 191.

The innocent payee of a note altered by the maker after an irregular indorser had signed, and before delivery to the payee, is a holder in due course and can recover against the indorser according to the original tenor of the note. *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592, S. C. secs. 52, 64-1; cf. *First Nat. Bank v. Gridley*, *supra*, sec. 66.

Alteration in amount by the maker after an accommodation indorsement but before negotiation. The accommodation indorser is liable for the original amount. *Packard v. Windholz*, 88 App. Div. 365, 84 N. Y. Supp. 666, *semble*, affirmed without opinion 180 N. Y. 549, S. C. sec. 66.

When a materially altered note was transferred before the passage of the Negotiable Instrument Law, the indorsee can not recover against the maker on it according to its original tenor. *Hecht v. Shenners*, 126 Wis. 27, 105 N. W. 359.

Quære, whether a material alteration by a stranger will avoid a negotiable instrument? *Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49, S. C. sec. 125. The language of section 124 leaves little room for doubt on this question.

Professor Ames, Judge Brewster and Mr. McKeehan all agree that section 124 abrogates the American doctrine of spoliation and substitutes the English rule.

Professor Ames regrets the return to archaic formalism but Judge Brewster approves the change. See *infra*, pp. 216-218, 296.

A note was indorsed in blank, but with a place of payment specified thereon, and given to another person with authority to fill up. Held, that authority to fill blanks did not authorize an erasure of the place of payment, and the interlineation of another place, that such alteration was material, and that an indorsee, having notice of the alteration could not be a holder in due course and could not recover according to the original tenor, even though he paid value for the note. *First Nat. Bank v. Barnum*, 160 Fed. 245.

This section applies to the physical alteration of the instrument. An extension of time, given by the holder of a note to the principal maker, without the consent of a surety co-maker, is not an alteration. *Richards v. Market Exch. Bank Co. (Ohio)*, 90 N. E. 1000, S. C. sec. 119.

A written agreement, securely glued to an accepted bill of exchange, is a part thereof, and if it be detached therefrom, without the acceptor's consent, this is a fraudulent material alteration. But a holder in due course may recover on the instrument according to its original terms. *Bothell v. Schweitzer (Neb.)*, 120 N. W. 1129.

Sed quære, since the instrument, as originally executed was not a negotiable instrument and therefore not subject to the N. I. L.?

In an action by an indorsee, the maker of a note answered that the note was an accommodation note, and that plaintiff took it with knowledge. At the trial, it appeared that plaintiff had altered the note by adding "with six per cent. interest." A motion to dismiss on this ground, among others, was denied, and judgment given for plaintiff which was reversed. *Wittelman v. Glass*, 117 N. Y. Supp. 940. The discussion by the court of the question whether the note was an accommodation note to the knowledge of plaintiff seems irrelevant; see section 29 N. I. L.

An accommodation indorser of a note, completed but so drawn as to leave spaces, which can be filled in so as to increase the amount, and which were so filled in by the maker, without the indorser's consent, is not liable, even to a holder in due course, for such increased amount, but only for the original amount. *National Exchange Bank v. Lester*, 194 N. Y. 461, 87 N. E. 79. But the drawer of a check, negligently drawn by leaving spaces which can be and are filled in to an increased amount, without exciting suspicion, and which is paid in good faith by the drawee bank, can not recover the amount from the bank. The question of negligence is for the jury. Section 124 does not cover the case and under section 196 the rule of the law merchant must prevail. *Young v. Grote*, 4 Bing, 253, approved. *Timbel v. Garfield Nat. Bank*, 121 App. Div. 870, 106 N. Y. Supp. 497.

In *Trust Co. of America v. Conklin*, 65 Misc. Rep. 1, 119 N. Y. Supp. 367, the case of *Timbell v. Garfield Nat. Bank* was approved, and the case of *National Exchange Bank v. Lester* distinguished on the ground that the depositor owes a duty to the

bank to exercise care in drawing his checks, and it was even held in this case that the depositor must lose, where he signed a check in blank, which was stolen, filled up, and paid by the bank in due course.

In *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 599, 70 Atl. 876, S. C. *supra*, sec. 9, the court seem to approve the rule of *Young v. Grote*, but made no reference to the Negotiable Instruments Law on this point.

A bill for £500 was accepted. The drawer afterwards changed the amount to £3,500 by filling spaces left by himself when he drew the bill. A holder in due course can recover £500 only. *Scholfield v. Londesborough*, [1896] A. C. 514.

The mere leaving of spaces in a check which can be filled in is not by itself a violation of duty by a customer to his banker, even though the jury find that the check was drawn negligently and that the bank was not guilty of negligence in paying the check. *Scholfield v. Londesborough* followed. *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559, Privy Council.

A check for \$5.00 was certified by the drawee bank. The drawer afterwards altered the check to \$500. The check was paid by the bank to a holder in due course. The bank can recover \$495.00 from the holder. *Imperial Bank v. Bank of Hamilton*, [1903] A. C. 49.

This proviso¹ is not retrospective, and even if it were so, the "necessary modification" referred to in sec. 89² would exclude Bank of England notes from the operation of sec. 64.³ Moreover the alteration is apparent if the bank could at once decipher and point out to the holder that the note had been materially altered, though the alteration might not be obvious to everybody. *Leeds & County Bank v. Walker*, 11 Q. B. D. 84

SEC. 125. Any alteration which changes:—

1. The date;
2. The sum payable, either for principal or interest;⁹⁶
3. The time or place of payment;
4. The number or the relations of the parties;⁹⁷
5. The medium or currency in which payment is to be made;⁹⁷

¹ See second paragraph of section 124 N. I. L.

² See *infra*, p. 310.

³ See section 124 N. I. L.

⁹⁶ The English Act omits the words "either for principal or interest."
B. E. A. s. 64 (2).

⁹⁷ Not in B. E. A. See s. 64 (2).

Or which adds a place of payment where no place of payment is specified,⁹⁸ or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.⁹⁹

A promissory note was delivered to the plaintiff with no revenue stamp on it, as required by the laws of the United States. Plaintiff subsequently affixed a stamp and cancelled it in the maker's name. Held, that as the note was admissible in evidence in Massachusetts courts without a stamp, annexing the stamp was not a material alteration. *Rowe v. Bowman*, 183 Mass. 488, 67 N. E. 636, S. C. sec. 28.

A check was originally drawn as follows:

“Iron County Bank, Crystal Falls, Mich., Aug. 5, 1901.
Pay to G. L. or order \$ 9 fifty cents
Dollars.

C. T. R.”

Held, that the insertion of the figure 5 before the figure 9, the instrument being otherwise unchanged, is a material alteration, constituting a forgery. The N. I. L. was not cited on this point. *Lawless v. State*, 114 Wis. 189, 89 N. W. 891.

Defendant signed a note payable to her own order which was delivered unindorsed to plaintiff in renewal of another note on which defendant was an indorser. Plaintiff without the consent of defendant struck out the name of defendant as payee and inserted the name of the maker of the original note, who then indorsed the new note. Held, that the alteration was material and the note was avoided as to the defendant. *Hoffman v. Planters' Nat. Bank*, 99 Va. 480, 39 S. E. 134.

A bill in equity for relief on the ground that an alteration was made in a negotiable instrument should describe the alteration in order that the court may see whether it was a material alteration. *Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49, *semble*, S. C. sec. 124.

It is not a material alteration to add to an indorsee's name the abbreviation “Cash” when it had been agreed that the draft should be discounted by the trust company of which the indorsee was cashier. *Birmingham Trust Co. v. Whitney*, 95 App. Div. 280, 88 N. Y. Supp. 578.

⁹⁸ The English Act reads, “And where a bill has been accepted generally, the addition of a place of payment without the acceptor's consent.” B. E. A. s. 64 (2).

⁹⁹ The last clause is omitted in the English Act. B. E. A. s. 64 (2). But the section begins with the words “In particular the following alterations are material,” indicating that the list is not intended to be exclusive of all other alterations.

The acceptor of a bill payable to the drawer or order, when accepting, struck out the words "or order" and wrote over his acceptance the words "in favor of F (the drawer) only." Held, that the alteration was immaterial, the bill being still payable to order under section 8 (4) B. E. A., and the acceptance was a general acceptance of a negotiable bill. *Meyer v. Decroix* [1891] A. C. 520. This case depends, of course, on the English Act which does not require that the instrument must be payable to order or to bearer in order to be negotiable.¹

TITLE II.

BILLS OF EXCHANGE.

ARTICLE I.

FORM AND INTERPRETATION.

SEC. 126. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.¹

Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.), 875, 121 Am. St. Rep. 858, S. C. secs. 152, 185; *Van Buskirk v. State Bank*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182, S. C. sec. 189; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451, S. C. secs. 71, 72-2.

An order by a contractor, directing the owner of the building to pay another a certain sum of money and deduct it from any amount due on final payment, is not a bill of exchange. *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 89 N. E. 138.

An order for the payment of money, addressed to no one in particular but generally to any one for whom the drawer might be employed or who owed him money, is too indefinite and uncer-

¹ The English Act reads "to or to the order of a specified person, or to bearer." B. E. A. s. 3 (1). Section 8 (4) also provides that "A bill is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."

tain to be binding on any one. *Dugane v. Hvezda Pokroku* No. 4 (Iowa), 119 N. W. 141. The N. I. L. was not cited.

The acceptor of bill payable to drawer or order, when accepting, struck out the words "or order" and wrote over his acceptance the words "in favor of F (the drawer) only." Held, that the arbitration was immaterial, the bill being still payable to order under sec. 8 (4) *supra*, p. 130, n. 1, and the acceptance was a general acceptance of a negotiable bill. *Meyer v. Deeroix* [1891], A. C. 520. See also *Bavins v. London & S. W. Bank* [1900] 1 Q. B. 270 and *Nathan v. Ogdens*, 21 T. L. Rep. 775, *infra*, sec. 185.

SEC 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.²

Wadhams v. Portland Ry. Co., 37 Wash. 86, 79 Pac. 597, S. C. sec. 132; *B. & O. Ry. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837, S. C. sec. 189; *Fulton v. Gesterding*, 47 Fla. 150, 36 So. 56; *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749.

A, having a certain sum on deposit with a bank, gave a check for a larger sum. Held, that the check on presentation operated as an intended assignation of the amount of the deposit. *British Linen Co. Bank v. Carruthers*, 10 Sess. Cas. 923.

A bill accepted payable at a banker's, operates on presentment as an intended assignation of the funds of the acceptor in the banker's hands. *British Linen Co. v. Rainey*, 12 Sess. Cas. 825.

SEC. 128. A bill may be addressed to two or more drawees jointly,³ whether they are partners or not; but not to two or more drawees in the alternative or in succession.

The Wisconsin Act omits the words "or in succession."

² The English Act is substantially the same except that "In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder, from the time the bill is presented to the drawee." B. E. A. s. 53 (1) (2).

³ The English Act omits the word "jointly." B. E. A. s. 6 (2).

SEC. 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill.⁴ Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.), 875, 121 Am. St. Rep. 858, S. C. secs. 152, 185.

SEC. 130. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

The Wisconsin Act omits the words "or a person" in line three.

SEC. 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

ARTICLE II.

ACCEPTANCE.

SEC. 132. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and

⁴ "An inland bill is a bill which is, or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill. For the purposes of this Act 'British Islands' mean any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty." B. E. A. s. 4 (1).

signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.⁵

Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064; B. & O. R. R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837, S. C. sec. 189; Van Buskirk v. State Bank, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182, S. C. sec. 189; Nelson v. Nelson Bennett Co., 31 Wash. 116, 71 Pac. 749, Dugane v. Hvezda Pokroku No. 4 (Iowa), 119 N. W. 141, S. C. sec. 126.

A complaint which fails to allege a written acceptance of a bill of exchange does not state a cause of action against the drawee. Wadhams v. Portland Ry. Co. 37 Wash. 86, 79 Pac. 597. But Faircloth-Byrd Mercantile Co. v. Adkinson (Ala.), 52 So. 419, is *contra* on a bill made before the N. I. L. took effect in Alabama, but under a former statute which also required an acceptance of a bill of exchange to be in writing.

But a plea which does not affirmatively disclose the fact that the contract was made by parol is a plea of a written agreement. So even though the statute required the acceptance of a bill to be in writing, a plea that the drawee "agreed to pay the order" is sufficient. Barnsdall v. Waltemeyer, 142 Fed. Rep. 415, 73 C. C. A. 515.

An unaccepted order drawn upon a debtor is not effectual as an equitable assignment, unless it is drawn upon a particular fund, and not to be payable generally. Izzo v. Ludington, 79 App. Div. 272, 79 N. Y. Supp. 744.

This section does not affect constructive acceptances under sec. 137. Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.), 1266, S. C. sec. 137.

Section 132, requiring the acceptance of a bill of exchange to be in writing, does not apply to a foreign bill, payable in another State; the law of such State not having been proved, the common law, according to which such acceptance may be oral will be held to apply. Bank of Laddonia v. Bright-Coy Commission Co. (Mo. App.), 120 S. W. 648.

⁵ "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. An acceptance is invalid unless it complies with the following conditions, namely: (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient. (b) It must not express that the drawee will perform his promise by any other means than the payment of money." B. E. A. s. 17 (1) (2). The English Act also has the following provision: "Where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable." B. E. A. s. 21 (1).

SEC. 133. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.⁶

This section is not confined to sight bills but is applicable to all bills of exchange. Presentment for acceptance of a bill, payable at a fixed time, is not necessary to charge the drawer or indorser, but it may be presented for acceptance at any time. *National Park Bank v. Saitta*, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. sec. 28.

SEC. 134. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.⁷

The Illinois Act omits the words "to whom it is shown and" in the third line.

SEC. 135. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.⁸

The Illinois Act inserts "or after" after "before" in the second line. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811.

SEC. 136. The drawee is allowed twenty-four hours after presentment, in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.⁹

⁶ Not in B. E. A.

⁷ Not in B. E. A.

⁸ Not in B. E. A.

⁹ "Where a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonored by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers." B. E. A. s. 42.

SEC. 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.¹⁰

The Illinois Act omits the provisions of this section.

The Wisconsin Act adds "Mere retention of the bill is not an acceptance."

AMES: It is a perversion of language to say that a refusal to accept is an acceptance. The holder might sue the drawee because of his fictitious acceptance and the drawer because of the drawee's non-acceptance. The drawee should only be held for conversion of the bill as in England.

BREWSTER: The provision was taken from the statutes of eight States, including New York. The bankers regarded it as a simple practical working rule.

COHEN: The section is imperfect. It would imply that if the bill be destroyed or not returned accepted within a reasonable time, notice of dishonor need not be given to the drawer. This ought not to be the law.

McKEEHAN: How can the holder bring concurrent actions? He may sue the drawee as acceptor, but the bill being treated as accepted, not the drawer, unless the bill is dishonored for non-payment. But there is force in Mr. Cohen's objection. Also on principle a destruction or refusal to return the bill is a conversion and not an acceptance.

Mere retention of a bill by the drawee is not an acceptance. Either destruction or a refusal to return to the holder must be shown. *Westberg v. Chicago Lumber Co.*, 117 Wis. 589, 94 N. W. 572, *semble*, S. C. sec. 1-4. The Wisconsin statute adds the words "mere retention of the bill is not an acceptance." But even without these words the same construction was put upon former statutes which were substantially the same as sec. 137, N. I. L. See *Matteson v. Moulton*, 79 N. Y. 627, *Dickinson v. Marsh*, 57 Mo. App. 566; *St. Louis & S. W. Ry. Co. v. James*, 78 Ark. 490, 95 S. W. 804. But *State Bank v. Weiss*, 46 Misc. R. 93, 91 N. Y. Supp. 276, is *contra* under the N. I. L., and in *Wisner v. First*

¹⁰ Not in B. E. A.

Nat. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.), 1266, S. C. sec. 132, it was held that under section 137 N. I. L., the presentation for acceptance is a demand for acceptance which, if the bill is retained by the drawee, implies a demand for its return if acceptance is declined, and that the mere failure to return the bill within twenty-four hours is an acceptance. And it was further held that under section 185 a check was subject to the same rules, and that failure to return within twenty-four hours a check sent to a drawee bank for payment was an acceptance of the check upon which the holder could recover against the bank, although the delay was due to the neglect of a notary public to whom the check was handed by the drawee bank to protest on the day of its receipt by the bank.

The delivery of a check by a bank to a notary public for protest is not a compliance with this section and does not relieve the drawee from liability, following *Wisner v. First Nat. Bank*; *Provident S. & B. Co. v. First Nat. Bank*, 37 Pa. Super. Ct. 17.

It is submitted that these decisions are erroneous, section 137 having no application to a check which was not presented for acceptance or certification, but for payment. But the case illustrates the evil possibilities of the section in the case of a check presented for certification (which by section 187 is equivalent to an acceptance), and inadvertently retained more than twenty-four hours. The danger has, however, been averted for the future in Pennsylvania by an amendment to the section (Laws of 1909, Act 169, April 27, 1909) which provides that "the mere detention of such bill by the drawee, unless its return has been demanded, will not amount to an acceptance: And provided further, that the provisions of this section shall not apply to checks."

In order to hold a drawee as acceptor under this section, the burden is upon the plaintiff to show that the instrument was negotiable paper of the nature and kind that could be presented for acceptance or that it was actually delivered to the drawee for acceptance and not for payment. *First Nat. Bank of Omaha v. Whitmore*, 177 Fed. Rep. 397.

SEC. 138. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

SEC. 139. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Meyer v. Decroix, [1891] A. C. 520, S. C. sec. 125.

SEC. 140. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

SEC. 141. An acceptance is qualified, which is:-

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular¹¹ place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

SEC. 142. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto.¹² When the drawer or an

¹¹ The English Act interpolates "specified." B. E. A. s. 19 (2) (c).

¹² The English Act adds: "The provisions of this subsection do not apply to a partial acceptance whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance." B. E. A. s. 44 (2).

indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE III.

PRESENTMENT FOR ACCEPTANCE.

SEC. 143. Presentment for acceptance must be made:—

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument;¹³ or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Van Buskirk v. State Bank, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182, S. C. sec. 189.

SEC. 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers¹⁴ are discharged.¹⁵

¹³ The English Act omits the words "or in any other case where." B. E. A. s. 39 (1).

¹⁴ The English Act interpolates "prior to that holder." B. E. A. s. 40 (2).

¹⁵ B. E. A. s. 40 (1), corresponding to the above section 144, relates only to bills payable after sight.

SEC. 145. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance¹⁶ for all, in which case presentment may be made to him only;
2. Where the drawee is dead, presentment may be made to his personal representative;
3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.¹⁷

SEC. 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.¹⁸

The Kentucky and Wisconsin Acts omit the last sentence.

The Colorado Act substitutes for the last sentence the following: "When any day is in part a holiday presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday."

¹⁶ The words "or refuse acceptance" are omitted in B. E. A. s. 41 (1) (b).

¹⁷ "Where the drawee is bankrupt, presentment may be made to him or to his trustee." B. E. A. s. 41 (1) (d).

¹⁸ Not in B. E. A. The Bank Holidays Act, 1871, s. 2, provides that when the day on which a bill should be presented for acceptance is a bank holiday, the bill shall be presented the next day. Chalmers' Bills of Exchange, 6th ed., 348; see also B. E. A. s. 92 *infra*, p. 159, n. 45.

SEC. 147. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.

The North Carolina Act uses "executed" instead of "excused" in the next to the last line, an evident clerical error.

SEC. 148. Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance, in either of the following cases:—

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.¹⁹
2. Where, after the exercise of reasonable diligence, presentment can not be made.
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.²⁰

SEC. 149. A bill is dishonored by non-acceptance:—

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or can not be obtained; or
2. When presentment for acceptance is excused, and the bill is not accepted.

¹⁹ "Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill." B. E. A. s. 41 (2) (a).

²⁰ The English Act adds: "The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment." B. E. A. s. 41 (3).

National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. secs. 24, 133.

SEC. 150. Where a bill is duly presented for acceptance and is not accepted within the prescribed²¹ time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. secs. 24, 133.

SEC. 151. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. secs. 24, 133.

ARTICLE IV.

PROTEST.

SEC. 152. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

The liabilities of the drawer of a bill of exchange are fixed by the law of the place where he draws it. So a bill drawn in New

²¹ The English Act uses the word "customary" instead of "prescribed." B. E. A. s. 42.

York and payable in Austria is a foreign bill (sec. 129), and must be protested in order to hold the drawer, although by the law of Austria no protest is required. *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, S. C. in Appellate Division, *infra*, sec. 185.

SEC. 153. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify,—

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.²²

London & River Plate Bank v. Carr, 54 Misc. R. 94, 105 N. Y. Supp. 679.

SEC. 154. Protest may be made by,—

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.²³

²² "A protest must contain a copy of the bill, and must be signed by the notary making it and must specify (a) The person at whose request the bill is protested; (b) The place and date of protest, the cause or reason for protesting the bill, the demand made and the answer given, if any, or the fact that the drawer or acceptor could not be found." B. E. A. s. 51 (7).

²³ "Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill." B. E. A. s. 94. A form of protest which may be used in such case is given in the first schedule to the Act.

SEC. 155. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.²⁴

Amsinck v. Rogers, 103 App. Div. 428, 93 N. Y. Supp. 87, S. C. sec. 185.

A bill was protested on 25th September, but noting on the bill was 24th September. The extended protest dated 25th September contained 25th September as date of noting. The protest was held invalid. *M'Pherson v. Wright*, 12 Sess. Cas. 942.

SEC. 156. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

SEC. 157. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

SEC. 158. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures,

²⁴ "Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting." B. E. A. s. 51 (4). "For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting." B. E. A. s. 93.

the holder may cause the bill to be protested for better security against the drawer and indorsers.²⁵

SEC. 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

SEC. 160. When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925, S. C. sec. 186.

ARTICLE V.

ACCEPTANCE FOR HONOR.

SEC. 161. Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account

²⁵ "Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers." B. E. A. s. 51 (5). The English Act has the additional provision: "When a bill is presented through the post office and returned by post dishonored, it may be protested at the place to which it is returned and on the day of its return, if received during business hours, and if not received during business hours, then not later than the next business day." B. E. A. s. 51 (6) (a).

the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.²⁶

SEC. 162. An acceptance for honor *supra* protest must be in writing,²⁷ and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

SEC. 163. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

SEC. 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

SEC. 165. The acceptor for honor, by such acceptance engages that he will, on due presentment, pay the bill according to the terms²⁸ of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor²⁹ given to him.

SEC. 166. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

²⁶ The provision in the last clause for a further acceptance by a different person for the honor of another party is not in the English Act; see s. 65 and s. 65 (2).

²⁷ The English Act reads, "must be written on the bill." B. E. A. s. 65 (3).

²⁸ The English Act uses "tenor" instead of "terms." B. E. A. s. 66 (1).

²⁹ The English Act reads "notice of these facts." B. E. A. s. 66 (1).

AMES: Section 166 enacts that the maturity of an acceptance for honor of a bill payable after sight shall be calculated from the date of the noting for non-acceptance, and not, as was erroneously decided in *Williams v. Germaine*,* from the date of the acceptance for honor.

SEC. 167. Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

SEC. 168. Presentment for payment to the acceptor for honor must be made as follows:—

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.³⁰

SEC. 169. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

SEC. 170. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

* 7 B. & C. 468.

³⁰ Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honor is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him." B. E. A. s. 67 (2).

ARTICLE VI.

PAYMENT FOR HONOR.

SEC. 171. Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

SEC. 172. The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

SEC. 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

SEC. 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

SEC. 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

AMES: This section codifies, as does the English Act, evidently by an oversight, the overruled case of *ex parte Lambert*. It should be amended by substituting for "liable" the fourth word from the end, the word "prior."

BREWSTER: Ex parte Lambert was the law in several States, and seems just.

McKEEHAN: It is doubtful whether the change in the English rule was inadvertant. The rule enacted by this section is probably the more just one.

SEC. 176. Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

SEC. 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.³¹

ARTICLE VII.

BILLS IN A SET.

SEC 178. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

SEC. 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

SEC. 180. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

³¹ The English Act adds, "If the holder do not on demand deliver them up, he shall be liable to the payer for honor for damages." B. E. A. s. 68 (6).

SEC. 181. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course,³² he is liable on every such part as if it were a separate bill.

SEC. 182. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

SEC. 183. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

Two parts of a bill of exchange drawn in a set in New York on a drawee in Paris were mailed in separate covers to the payees in Spain. Only the second part of the bill was received. This was indorsed by the payees, negotiated and presented to the drawee and payment refused, because the first part, which was apparently regularly indorsed by the payees and several other persons, had been previously presented and paid in good faith. One notice of dishonor was given to the drawer and the indorsee of the payees sued the drawer. The French Code of Commerce provided that "The party who pays a bill of exchange at its maturity and without opposition is presumably discharged." Held, that as the validity of the payment was governed by the law of the place of performance and as by the French Code the payment of the first part of the bill was valid, although the endorsements were forged, and the drawer was therefore discharged, a complaint which set forth the above facts was demurrable. *Caras v. Thalmann*, 123 N. Y. Supp. 97.

The Wisconsin Act here inserts two sections, entitled "Damages on Bills," as follows:

"Sec. 1682. Whenever any bill of exchange drawn or indorsed within this State and payable without the limits of the United States shall be duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same as the current rate of exchange

³² The English Act reads, "get into the hands of different holders in due course." B. E. A. s. 71 (4).

at the time of the demand and damages at the rate of five per cent. upon the contents thereof, together with interest on the said contents to be computed from the date of the protest; and said amount of contents, damages and interest shall be in full of all damages, charges and expenses.

"Sec. 1683. If any bill of exchange drawn upon any person or corporation out of this State, but within some State or Territory of the United States, for the payment of money shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment, the drawer or endorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill with legal interest, according to its tenor and five per cent. damages, together with costs and charges of protest."

TITLE III.

PROMISSORY NOTES AND CHECKS.

ARTICLE I.

SEC. 184. A negotiable³³ promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.³⁴ Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

Alexander v. Hazelrigg, 123 Ky., 677, 97 S. W. 353, S. C. sec. 55; Young v. American Bank (No. 1), 44 N. Y. Misc. R. 305, 89 N. Y. Supp. 913; Young v. American Bank (No. 2), 44 N. Y. Misc. R. 308, 89 N. Y. Supp. 915; Sherman v. Goodwin (Arizona), 89 Pac. 517; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; First Nat. Bank of Pomeroy v. Buttery (N. D.), 116 N. W. 341, 16 L. R. A. (N. S.) 878, S. C. sec. 120-5.

A complaint on a note payable to the maker's order which fails to allege indorsement by the maker is defective. Simon v. Mintz, 51 Misc. Rep. 670, 101 N. Y. Supp. 86; Edelman v. Rams, 58 Misc. Rep. 561, 109 N. Y. Supp. 816.

An instrument reading "Having been cause of a money loss to my friend X, I have given her three thousand dollars. I hold this amount in trust for her and one year after date or thereafter, on demand, I promise to pay to the order of X, her heirs

³³ "Negotiable" is omitted in the English Act. B. E. A. s. 83 (1).

³⁴ The English Act reads, "a sum certain in money to, or to the order of a specified person or to bearer." B. E. A. s. 83 (1) and see also section 8 (4), *supra*, p. 130, n. 1.

or assigns, three thousand dollars with interest" is a valid promissory note. As it does not appear upon the face that there was no consideration or an invalid consideration, it will be presumed that there was a valid consideration. In the absence of evidence to the contrary the court must assume that the money loss referred to was legally chargeable to the maker. *Hickok v. Bunting*, 92 App. Div. 167, 86 N. Y. Supp. 1059.

A stipulation in a promissory note that "no extension of time of payment, with or without our knowledge, by the receipt of interest or otherwise, shall release us or either of us from the obligation of payment" is an express contract that the time of payment may be extended to any one or all of the sureties, guarantors, indorsers, or makers of the note without notice to all or any one of them and renders the note non-negotiable. *Union Stockyards Nat. Bank v. Bolan*, 14 Idaho 87, 93 Pac. 508, 125 Am. St. Rep. 146.

An instrument in the form of a joint and several promissory note contained the clause, "No time given to, or security taken from, or composition or arrangement entered into, with either party hereto shall prejudice the rights of the holder to proceed against any other party." Held, a valid promissory note within sec. 83 (1),* *Kirkwood v. Carroll*, [1903] 1 K. B. 531, overruling *Kirkwood v. Smith*, [1896] 1 Q. B. 582, and approving *Yates v. Evans*, 61 L. J. Q. B. 446.

SEC. 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

B. & O. Ry. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837, S. C. sec. 189; *Schlesinger v. Kurzrok*, 47 Misc. Rep. 634, 94 N. Y. Supp. 442, S. C. sec. 187; *State Bank v. Weiss*, 46 N. Y. Misc. 93, 91 N. Y. Supp. 276, S. C. sec. 137; *Van Buskirk v. State Bank*, 35 Col. 142, 83 Pac. 778, 117 Am. St. Rep. 182, S. C. sec. 189; *Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59; *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655, S. C. secs. 9-5, 56; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451, S. C. secs. 71, 72-2; *Wisner v. First Nat. Bank*, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266, S. C. secs. 132, 137.

An instrument not drawn on a bank is not a check, although it may be so styled on its face. *Amsinck v. Rogers*, 103 App. Div. 428, 93 N. Y. Supp. 87, affirmed 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 12 Am. St. Rep. 858, S. C. sec. 152.

* Sec. 184, N. I. L.

An order on a bank to pay "provided the receipt form at foot hereof is duly signed, stamped, and dated," is not an unconditional order to pay and is therefore not a check. *Bavins v. London & S. W. Bank*, [1900] 1 Q. B. 270.

But a check which bore at the foot the words "The receipt at the back hereof must be signed, which signature will be taken as an indorsement of the check," and on the back of which was a receipt form, is negotiable, since the order to pay is unconditional, the words at the foot not being addressed to the bankers and not affecting the order to them. *Nathan v. Ogdens*, 21 T. L. R., 775 (*semble*).

The provision that a check is a bill of exchange is declaratory. *M'Lean v. Clydesdale Banking Co.*, 9 App. Cas. 95.

A deposit in the A bank by the drawer of a certified check on the B bank is not the same as a deposit of cash, although the amount is credited to the depositor, and if the B bank fails the depositor can not hold the A bank, no negligence in failing to present the check for payment being shown. *Gaden v. Newfoundland Savings Bank* [1899] A. C. 281, Privy Council.

The practice of certifying checks does not appear to prevail in England. *Chalmers, Bills of Exchange*, 6th ed. 249.

SEC. 186. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.*

The Illinois Act interpolates "and notice of dishonor given to the drawer as provided for in the case of bills of exchange" after the word "issue" in line two.

The criticisms and comments on this section by Professor Ames, Judge Brewster and Mr. McKeehan will be found under section 89, *supra*.

Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59; *Moskowitz v. Deutsch*, 46 Misc. 603, 92 N. Y. Supp. 721, S. C. sec. 124.

* "Subject to the provisions of this Act,—(1) Where a check is not presented for payment within a reasonable time of its issue, and the drawer, or the person on whose account it is drawn, had the right at the time of such presentment, as between him and the banker, to have the check paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such check been paid . . . (3) The holder of such check as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him." B. E. A. s. 74.

Where the payee of a check indorsed and deposited it in his own bank, which credited him with the amount as cash to be drawn against, the bank became *prima facie* the owner of the check and not a mere agent to collect, and in order to charge the payee as indorser the bank must present the check to the drawee bank within a reasonable time. *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925.

The indorser of a check does not waive delay in presentment and renew his obligation by procuring and indorsing a duplicate of a lost check from liability upon which he has been discharged by such delay. *Ib.*

Although under sec. 185 a check is a bill of exchange payable on demand, it is intended for immediate use and not to circulate as a promissory note. Therefore the transfer of a check to successive holders, where it is drawn and delivered in the place where the drawee bank is located, does not extend the time for presentment. If the check is delivered on one day and is not presented before the close of banking hours the next business day, the drawer is discharged to the extent of any loss suffered from the failure to present. *Gordon v. Levine*, 194 Mass. 418, 80 N. E. 505, 120 Am. St. Rep. 565; *Matlock v. Scheuerman*, 51 Oregon 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747, S. C. secs. 25, 53, 56; *Dehoust v. Lewis*, 128 App. Div. 131, 112 N. Y. Supp. 559.

A check which, if presented during banking hours the next day after its receipt, would have been paid, was not presented until the second day and in the meantime the drawer failed. Held, that by the delay the holder made the check his own, and had no greater rights than ordinary creditors. *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227; *Gordon v. Levine*, *supra*, was cited but the N. I. L. was not.

Where a check is negotiated at a town distant from the drawee bank, it is not negligence to forward it for collection through the mails, even though it might have been more expeditiously sent by messenger. Nor is it necessarily negligence to send it to the drawee instead of to a third person for presentation, where payment was refused because of lack of funds of the drawer and its dishonor could not have been ascertained sooner if it had been forwarded to a collecting agent. *Citizens' Bank v. First Natl. Bank*, 135 Iowa 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303, S. C. sec. 71. See also *Plover Savings Bank v. Moodie*, *supra*, sec 71, as to forwarding checks where the drawee bank is in another place.

The payee of a check delivered on Sunday in payment of a debt can not hold the drawer on non-payment by the bank, although the check was presented within a reasonable time. And even though the check was invalid because delivered on Sunday, the payee can not recover on the original claim against the drawer if he failed to present the check for payment with due diligence before the drawee bank failed. *Gordon v. Levine*, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361, S. C. sec. 53.

In an action on a check unpaid because of the payee's failure to present within a reasonable time and until after the closing of the drawee bank, the burden is on the plaintiff to show that the drawer has suffered no loss by said delay. *Dehoust v. Lewis*, 128 App. Div. 131, 112 N. Y. Supp. 559, *semble*.

"Reasonable time" under this section is a question of fact for the jury. *Wheeler v. Young*, 13 T. L. R. 468.

SEC. 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.³⁵

For comment on this section by Professor Ames see *supra*, section 62.

Where the drawer of a check before delivery to the payee procures its certification and the bank fails before presentation for payment, the bank is not liable on the check to the drawer, but only to the holder, and therefore the drawer on receiving the check from the payee can not set it off against a debt to the bank. *Schlesinger v. Kurzrok*, 47 Misc. R. 634, 94 N. Y. Supp. 442.

Notice to a bank by a depositor that his certified check, indorsed in blank, had been lost and to stop payment would not justify the bank in refusing payment to a holder in due course. *Poess v. Twelfth Ward Bank*, 43 Misc. R. 45, 86 N. Y. Supp. 857, *semble*, S. C. secs. 16, 51. See also *Unaka Bank v. Butler*, *supra*, sec. 56, cf. *Elliott v. Worcester Trust Co.*, *supra*, sec. 87, and *Pease & Dwyer v. State Nat. Bank*, *infra*, sec. 189.

The payee of a check given to him for value transferred it, also for value, to plaintiff, but without indorsing it. The payee died the next day, and the drawer, although having no equities against the check, stopped payment. Plaintiff subsequently sent the check to the drawee bank, and the teller certified it without asking any questions. Held, that under sec. 49 N. I. L. the title of the payee vested in plaintiff, and that the bank was liable to him upon its certification. *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83, S. C. sec. 49.

SEC. 188. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.³⁶

National Bank of Rolla v. First Nat. Bank of Salem (Mo. App.) 125, S. W. 513, S. C. sec. 62; *Gallo v. Brooklyn Sav. Bank*, 199 N. Y. 222.

Schlesinger v. Kurzrok, 47 Misc. R. 634, 94 N. Y. Supp. 442, S. C. sec. 187, *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83, S. C. secs. 49, 187.

³⁵ Not in B. E. A.

³⁶ Not in B. E. A.

The mere acceptance by the payee of a check certified by the procurement of the drawer is not a discharge of the drawer, even though the bank at the time the check was certified transferred the amount to the credit of the payee, such transfer being without the knowledge or acquiescence of the payee. *Cullinan v. Union Surety & Guaranty Co.*, 79 App. Div. 409, 80 N. Y. Supp. 58.

But where the holder procures certification of a check, this is payment to the amount of the check, and where the check contained a statement on the back that it was to be in full payment, such procuring of certification is an acceptance of the check in full payment. *St. Regis Paper Co. v. Tonawanda Co.*, 107 App. Div. 90, 94 N. Y. Supp. 946.

So also where the holder procured certification of a check sent in a letter stating that it was in full payment, although the holder after the certification wrote to the drawer and declined to accept the check in full payment. *Dunn v. Whalen*, 120 App. Div. 729, 105 N. Y. Supp. 588. The N. I. L. was not cited in this case.

When the holder procures certification of a check, the drawer is discharged and the bank becomes a debtor to the holder and can not avoid payment by showing that the holder obtained the check from the drawer by false pretenses. The certification has the same effect as if the holder had drawn the money, re-deposited it and taken a certificate of deposit for it. But *semble* that if the drawer procures the certification, since he is not thereby discharged, either he or the bank can set up the fraud on the drawer. *Times Square Automobile Co. v. Rutherford Nat. Bank (N. J.)*, 73 Atl. 479. *Sed quære* as to this dictum, so far as concerns the liability of the bank if more than a reasonable time has elapsed since the delivery of the check to the payee whereby the drawer is discharged.

SEC. 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.³⁷

Schlesinger v. Kurzrok, 47 Misc. R. 634, 94 N. Y. Supp. 442, S. C. sec. 187; *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88

³⁷ The English Act makes no such provision as to checks specially, but section 53 (1) provides that "A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument." And section 73 provides that "Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

N. Y. Supp. 83, S. C. secs. 49, 187; *Raesser v. Nat. Exch. Bank*, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979; *Lonier v. State Savings Bank*, 149 Mich. 483, 112 N. W. 1119; *Boswell v. Citizens' Savings Bank*, 123 Ky. 485, 96 S. W. 797.

Before its payment or certification by the bank the drawer of a check may countermand the order, and payment thereafter to the payee by the bank is wrongful. *Pease & Dwyer v. State Nat. Bank*, 114 Tenn. 693, 88 S. W. 172, cf. *Unaka Bank v. Butler*, *supra*, sec. 56; *Poess v. Twelfth Ward Bank*, *supra*, sec. 187. A bank is under no legal obligation to the holder of an unaccepted and uncertified check. Payment is therefore voluntary and can not be recovered back from a *bona fide* holder on the ground that the drawer had previously countermanded payment of the check. *National Bank v. Berrall*, 70 N. J. L. 757, 58 Atl. 189, 103 Am. St. Rep. 821.

A drawee bank paid and charged to the account of the drawer checks indorsed by an agent of the payee who had no authority to indorse or collect the checks, and who appropriated the money. Held, that the bank was not liable to the payee in assumpsit for money had and received. *B. & O. Ry. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837. It would seem that the plaintiff misconceived his remedy and that he should have sued the bank for the conversion of checks belonging to him. *Ellery v. People's Bank*, 114 N. Y. Supp. 108.

A bank being asked to cash a check on another bank, telephoned to the drawee bank and was informed that the check was "good" or "all right," and thereupon cashed the check, but before presentment for payment the drawer notified the drawee bank not to pay the check. Held, the drawee bank was not liable on the check, because it was not accepted or certified in writing. *Van Buskirk v. State Bank*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182.

Notwithstanding section 189, an action in equity will lie by the payee of a check to whom an assignment of the fund was also given, and such assignment will be upheld against subsequent claimants. *Hove v. Stanhope State Bank*, 138 Iowa 39, 115 N. W. 476.

TITLE IV.

GENERAL PROVISIONS.

ARTICLE I.

SEC. 190. This act shall be known as the Negotiable Instruments Law.³⁸

The Nebraska Act omits this section.

³⁸ "This Act may be cited as the Bills of Exchange Act, 1882." B. E. A. s. 1.

SEC. 191. In this act, unless the context otherwise requires,—

“Acceptance” means an acceptance completed by delivery or notification.³⁹

“Action” includes counter-claim and set-off.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.⁴⁰

“Bearer” means the person in possession of a bill or note which is payable to bearer.(a)

“Bill” means bill of exchange, and “note” means negotiable promissory note.⁴¹

“Delivery” means transfer of possession, actual or constructive, from one person to another.(b)

“Holder” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.(c)

“Indorsement” means an indorsement completed by delivery.(d)

“Instrument” means negotiable instrument.⁴²

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.(e)

“Person” includes a body of persons, whether incorporated or not.

³⁹ The English Act contains the same provision, but also provides that “where an acceptance is written on a bill and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.” B. E. A. ss. 2, 21 (1). See *supra*, p. 21, n. 8, and p. 133, n. 5.

⁴⁰ “‘Banker’ includes a body of persons, whether incorporated or not, who carry on the business of banking.” B. E. A. s. 2.

⁴¹ “‘Bill’ means bill of exchange and ‘note’ means promissory note.” B. E. A. s. 2.

The same section of the English Act also gives the following additional definition: “‘Bankrupt’ includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.”

⁴² Not in B. E. A.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

(a) "Bearer," see *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, *supra*, secs. 31, 49. The maker of a note who has obtained possession of it by theft after it has been indorsed in blank by the payee is the bearer within the meaning of the statute. *Mass. Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959, S. C. secs. 9-5, 16, 56, 124.

(b) "Delivery," see *Irwin v. Deming*, 142 Iowa 299, 120 N. W. 645, S. C. sec. 30; *Gray v. Baron* (Arizona), 108 Pac. 229.

(c) "Holder," see *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, *supra*, secs. 31, 49; *Farmers' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817, *supra*, sec. 66; *New Haven Mfg. Co. v. New Haven Pulp Co.*, 76 Conn. 126, 55 Atl. 604, *supra*, sec. 48; *Vander Ploeg v. Van Zuuk*, 135 Iowa 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, *supra*, sec. 14. *R. M. Owen & Co. v. Storms & Co.* (N. J.), 72 Atl. 441, *supra*, sec. 51; *Craig v. Palo Alto Stock Farm* (Idaho), 102 Pac. 393, *supra*, sec. 51.

(d) Indorsement," see *Louisville Co. v. International Trust Co.*, 18 Colo. App. 345, 71 Pac. 898, S. C. *supra*, sec. 30.

The possessor of an unindorsed bill payable to order, who is not the payee, is neither a "holder" nor a "bearer." *Day v. Longhurst*, W. N. (1893) 3; cf. *Walters v. Neary*, 21 T. L. R. 146, S. C. sec. 49.

(e) "Issue," see *Bank of Houston v. Day* (Mo. App.), 122 S. W. 756, *supra*, sec. 13.

SEC. 192. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.⁴³

The Kansas Act omits the last sentence.

Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, S. C. sec. 89; *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421, 14

⁴³ Not in B. E. A.

L. R. A. (N. S.) 847, S. C. sec. 64-1. Northern State Bank v. Bellamy (N. D.) 125, N. W. 888, S. C. sec. 120-5; Richards v. Market Exchange Bank Co. (Ohio), 90 N. E. 1000, S. C. secs. 119, 124.

An accommodation maker is a person primarily liable even though he add the word "surety" to his signature or the fact that he signed for accommodation is otherwise known to the holder. See cases under sec. 119, *supra*.

SEC. 193. In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.⁴⁴

Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59; McLean v. Bryer, 24 R. I. 599, 54 Atl. 373, S. C. secs. 53, 64-1; Gordon v. Levine, 194 Mass. 418, 80 N. E. 505, 120 Am. St. Rep. 565, S. C. sec. 186; Citizens' Bank v. First Natl. Bank, 135 Iowa 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303, S. C. secs. 71, 186. See also cases under sec. 71.

In the absence of any evidence to bring the case within this section, a demand on a promissory note payable on demand must be made within sixty days to charge an indorser, that having been the law in this State prior to the Negotiable Instruments Law. Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987, S. C. sec. 71.

A demand note was given by a friendly arrangement between the parties, with the understanding that the payee should ask payment when he needed it. It was presented for payment, dishonored, and notice given to an accommodation indorser about seven months after its date. Held, error to dismiss the complaint as against the indorser, on the ground that the demand was not made within a reasonable time. Becker v. Horowitz, 114 N. Y. Supp. 161.

SEC. 194. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.⁴⁵

⁴⁴ The provision here stated generally is made in the English Act as to bills in sections 40 (3) and 45 (2), as to checks in sections 73 and 74 (2), and as to promissory notes in sections 86 (2) and 89 (1).

⁴⁵ Not in B. E. A. See B. E. A. s. 14, *supra*, p. 98, n. 71, and B. E. A. s. 92, which reads "Where by this Act the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded. 'Non-

The statutory construction laws of the respective States should be consulted in connected with this and similar sections, *e. g.*, see Consolidated Laws of New York, 1909, secs. 20, 24, 25.

SEC. 195. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.⁴⁶

The Arizona Act omits this section.

The N. I. L. does not apply to actions on instruments made and delivered before the statute became effective. *Dorsey v. Wellman* (Neb.), 122 N. W. 989.

SEC. 196. In any case not provided for in this act the rules of the law merchant shall govern.⁴⁷

The Kentucky Act omits this section.

Oakdale Mfg. Co. v. Clarke, 29 R. I. 192, 69 Atl. 681, S. C. sec. 47.

Where the negotiable instruments law is silent, resort must be had to the law merchant or the common law regulating negotiable paper. *Mechanics' & Farmers' Savings Bank v. Katterjohn* (Ky.), 125 S. W. 1071, S. C. secs. 63, 109.

Under this clause a foreign drawer has still a right to re-exchange against an English acceptor, notwithstanding the provisions of sec. 57 B. E. A.* *In re Gillespie*, 16 Q. B. D. 702, affirmed 18 Q. B. D. 286.

business days' for the purposes of this Act mean—(a) Sunday, Good Friday, Christmas Day; (b) A bank holiday under the Bank Holidays Act, 1871, or acts amending it; (c) A day appointed by Royal proclamation as a public fast or thanksgiving day. Any other day is a business day." For the Bank Holidays Acts see *Chalmers, Bills of Exchange*, 6th ed., 347-351.

⁴⁶ Not in B. E. A., but the general rule of law is that a statute is not to be construed as retrospective unless so made in express terms. *Chalmers, Bills of Exchange*, 6th ed., 2.

⁴⁷ "The rules of common law, including the law merchant, save so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes and cheques." B. E. A. s. 97 (2).

* *Infra*, p. 301.

SEC 197. Of the laws enumerated in the schedules hereto annexed, that portion specified in the last column is repealed.

The form of this section differs in the various States.

SEC. 198. This chapter shall take effect on

New York adds the following section, by amendment (Laws, 1904, ch. 287): "No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised."

A number of the States add sections defining public holidays and making provisions as to notes given for a patent right.

COMMENTS AND CRITICISMS UPON THE
NEGOTIABLE INSTRUMENTS LAW.¹THE NEGOTIABLE INSTRUMENTS LAW.²

BY JAMES BARR AMES.

HOWEVER much lawyers may differ as to the expediency of the attempt to secure by codification uniformity in American commercial law, all will agree that the commissioners for promoting uniformity of legislation in the United States could not have selected a better subject for the beginning of the experiment than that of negotiable paper. Even the opponents of codification must admit that the Negotiable Instruments Law, framed and recommended by the commissioners in 1896, and already enacted in fifteen states,³ contains a number of desirable changes in the law of Bills and Notes, and will, when generally adopted, settle definitively several questions which have given rise to much litigation and conflict of decisions. On the other hand, the friends of codification who chance to read the following pages may become convinced that there are serious defects of commission and omission in the new code. Codification is with us a new art, and it is not surprising, although it is unfortunate, that the commissioners did not realize, as continental codifiers realize, the extreme importance of the widest possible publication of the proposed code, and the necessity of abundant criticism, especially of public criticism, from practising lawyers and judges, professors and writers, merchants and bankers. It is far from an agreeable task to offer criticisms at this late hour.⁴ Nor would the following criticisms be offered now but for the writer's conviction that

¹ The following articles are reprinted from 14 *Harvard Law Review* 241; 10 *Yale Law Journal* 84; 14 *Harvard Law Review* 442; 15 *Harvard Law Review* 26; 16 *Harvard Law Review* 255, and 41 *American Law Register*, N. S. 437, 499, 561.

² Reprinted from 14 *Harvard Law Review* 241.

³ Colorado, Connecticut, Florida, Maryland, Massachusetts, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, Wisconsin, and also the District of Columbia.

⁴ The writer, although interested in the subject of Bills and Notes both as an author and as a teacher, saw the Negotiable Instruments Law for the first time after its enactment by four state legislatures.

the Negotiable Instruments Law ought not to be enacted by any state which has not yet acted in the matter, unless changed in important respects, and that those states in which it has been adopted should remedy its defects by supplemental legislation.¹ The plan of making the law of Bills and Notes uniform throughout the United States has found favor in so many states that the enterprise ought to be carried through on the basis of the commissioners' proposed code. But in the interest of future codification, as well as for the sake of the law itself, this new legislation should be in such form as to stand the fire of adverse, if also fair-minded, critics.

Before considering the defects in the new code attention should be called to its merits. These are of two kinds: first, salutary changes in the law; and, secondly, the settlement of controverted questions.

Under the new law a negotiable instrument may be made payable to one or more of several payees,² or to the holder of an office for the time being.³ These provisions give effect to the tenor of the instrument and nullify certain unfortunate decisions to the contrary in which the judges failed to grasp the mercantile conception of such instruments.⁴ Another judicial error is corrected by the provision that an instrument, though indorsed in blank, ceases to be negotiable by delivery whenever the last indorsement thereon is a special indorsement.⁵ Section 166 enacts that the maturity of an acceptance for honor of a bill payable after sight shall be calculated from the date of the noting for non-acceptance, and not, as was erroneously decided in *Williams v. Germaine*,⁷ from the date of the acceptance for honor. Since an acceptor, by section 62, engages to pay the bill "according to the tenor of his acceptance," he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered

¹ For several of the criticisms here suggested the writer gratefully acknowledges his indebtedness to his colleagues, Professor Williston and Professor Brannan, who successively have had charge of the subject of Bills and Notes in the Harvard Law School during the last ten years, and he takes satisfaction in adding that these experts in the law of Negotiable Paper concur with the views expressed in this paper.

² N. I. L. sec. 8-5. The references follow the numbering of the commissioners' draft.

³ N. I. L. sec. 8-6.

⁴ *Blanckenhagen v. Blundell*, 2 B. & Al. 417; *Cowie v. Stirling*, 6 E. & B. 333.

⁵ N. I. L. sec. 9-5, nullifying the doctrine first advanced by Lord Kenyon in *Smith v. Clarke, Peake*, 225; 1 Esp. 180, s. c. The language of sec. 9-5 is not happily chosen for the reasons pointed out, *infra*, p. 46.

⁶ 7 B. & C. 468.

by the drawer. A bank certifying a raised check is in the same case, since section 187 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, *a fortiori* a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this country into harmony with the law of nearly, if not indeed all, of the European states.¹

Other judicious changes for the better, but not involving the correction of judicial mistakes, are the following: The abolition of days of grace;² the assimilation of sight and demand paper;³ the provisions that the negotiability of the instrument shall not be affected by its bearing a seal;⁴ that a payor may disregard a condition in an indorsement;⁵ and that the holder in due course may enforce payment of an altered instrument according to its original tenor.⁶

Especially to be commended are those sections of the new code which settle, and in the right way, certain questions which have been a prolific source of litigation and antagonistic decisions. Nothing but good can come from enacting that the negotiability of an instrument is not destroyed by a clause providing for the payment of exchange,⁷ or the costs of collection, or an attorney's fee in case of default,⁸ or by a clause giving a power to confess judgment.⁹ The same is true of the provisions that an antecedent debt constitutes value;¹⁰ that the holder in due course, although he paid less, may enforce payment of the face value from all parties to the instrument;¹¹ and that a check is not an assignment of the drawer's claim upon the bank.¹² The rules regulating the liability of the anomalous indorser¹³ are admirable, but for one slight omission which may be easily remedied, as will be shown on a subsequent page.¹⁴ The doctrine of section 16, that one who has signed a negotiable instrument complete on its face is liable thereon to a holder in due course, although it was never delivered by him, but lost by him, or stolen from him, or even from some one else after his death, is somewhat startling

¹ 4 Harvard Law Review 306, 307.

² N. I. L. sec. 7-1.

³ N. I. L. sec. 124.

⁴ N. I. L. sec. 5-2.

⁵ N. I. L. sec. 189.

⁶ N. I. L. sec. 6-4.

⁷ N. I. L. sec. 2-4.

⁸ N. I. L. sec. 25.

⁹ N. I. L. sec. 64.

¹⁰ N. I. L. sec. 85.

¹¹ N. I. L. sec. 39.

¹² N. I. L. sec. 2-5.

¹³ N. I. L. sec. 57.

¹⁴ *Infra*, p. 50.

at first. But it should commend itself on reflection. It has been adopted, after much consideration, in Germany.

The new code, it is believed, would have gained greatly in simplicity, arrangement, and expression, if its framers had grasped firmly the principle that the formal right of a claimant upon a bill or note depends solely upon whether he is the holder by the tenor of the instrument, and had also given due emphasis to the distinction between real and personal or equitable defences. It is, however, too late to recast the code. The critic must content himself with pointing out formal or substantial defects in particular sections.

If it be said that it is not worth while to make merely formal changes in sections that have been already enacted in sixteen jurisdictions, it may be answered that clearness, conciseness, and the right way of putting things are intrinsically desirable, and that improvements of this kind do not involve any sacrifice, as to the substantive law, of the principle of uniformity.

It is from this point of view that the following suggestions are made as to matters of form.

SECTION 3-2 provides that an order or promise is not rendered conditional by the addition of "A statement of the transaction which gives rise to the instrument." What do these words mean? Do they cover the case of a note coupled with the words, "Given as collateral security for A's debt to the payee"? Such an interpretation, although a literal one, would be deplorable, and would nullify several decisions.¹ Mr. Crawford, the draftsman of the code, suggests that this sub-section applies to the case of notes containing a statement that it is given for a chattel which is to be the property of the owner of the note until the note is paid.² Such a note is deemed negotiable in several states,³ and justly, being in effect nothing more than a note secured by a chattel mortgage. But it is highly improbable that the courts of Massachusetts, Kansas, and Minnesota, which have taken the opposite view,⁴ will treat this sub-section as changing the law of those

¹ *Robbins v. May*, 11 A. & E. 213; *Haskell v. Lambert*, 16 Gray, 592; *Costelo v. Crowell*, 127 Mass. 293; 134 Mass. 280, 285; *American Bank v. Sprague*, 14 R. I. 410; *Hall v. Merrick*, 40 Up. Can. Q. B. 566.

² Crawford, An. N. I. L. 12.

³ *Chicago Co. v. Merch. Bank*, 136 U. S. 268; *Howard v. Simpkins*, 69 Ga. 773; *Choate v. Stevens*, 116 Mich. 28; *Heard v. Dubuque Bank*, 8 Neb. 10; *Mott v. Havana Bank*, 22 Hun, 354; *Kimball v. Mellon*, 80 Wis. 133.

⁴ *Sloan v. McCarty*, 134 Mass. 245; *South Bend Co. v. Paddock*, 37 Kan. 510; *Deering v. Thorn*, 29 Minn. 120.

states. One New York judge has already ruled that the Negotiable Instruments Law has no application to such a note.¹ Many cases have decided that the statement of a consideration in a note is not notice to a transferee of its failure.² But the doctrine of these cases, which are doubtless the only ones which this sub-section can fairly be made to cover, is a rule as to *bona fides*, and has nothing to do with conditions. The sub-section in question should be stricken from the act. If interpreted literally, it is mischievous. If not taken literally, it is obscure, inartistic, and useless.

SECTION 36-2 and 3. An indorsement is restrictive which either (1) "constitutes the indorsee the agent of the indorser, or (2) vests the title in the indorsee in trust for or to the use of some other person." Since the so-called "agent of the indorser" has, under section 37, the right to sue in his own name on the instrument, but for the benefit of the indorser, he is in truth a trustee, and not a mere agent. The sub-sections 2 and 3 should therefore be consolidated as follows: "An indorsement is restrictive which vests the title in the indorsee in trust for the indorser or some third person."

SECTION 137 is to the effect that a drawee who destroys a bill delivered to him for acceptance, or refuses to return it within the usual time, shall be deemed to have accepted it. A refusal to accept is an acceptance! Such a perversion of language would be strange enough anywhere, but in a deliberately framed code is well-nigh inexplicable. As a consequence of this fantastic provision the holder may bring concurrent actions: against the drawee because of his fictitious acceptance, and against the drawer because of the drawee's non-acceptance. Nor is anything gained by this fiction, of which there is no trace in the English act. All the demands of justice are met by holding the misconducting drawee liable for a conversion of the bill.³ The section should be cancelled as worse than useless.

The following sections of the code seem to the writer to be defective, not merely in point of form, but in substance.

SECTION 9-3 declares an instrument to be payable to bearer, although it is "payable to the order of a fictitious or non-existing person." Such a rule ignores the tenor of the instrument; nor is

¹ Third Bank v. Spring, 28 N. Y. Misc. Rep. 9.

² 1 Ames, Cases on Bills and Notes, 775, n. 1.

³ Under the New York statute, 2 Rev. Stat. (6th ed.) 1161, from which section 137 is copied, the holder, to recover, must prove a conversion of the bill. *Matteson v. Moulton*, 79 N. Y. 627.

there any judicial precedent or mercantile custom in support of the notion that a bill payable to a fictitious payee, but not indorsed in the name of such payee, is payable to bearer. In all the reported cases, instruments payable to a fictitious payee have been indorsed in the name of such payee before negotiation. By the combined effect of this section and section 16, if a note payable to a fictitious payee were stolen from the maker, and indorsed by the thief in the name of the payee, the maker would be liable upon the note to any holder in due course. For, the note being already payable to bearer, the forged indorsement in the payee's name would be of no legal significance. Such a result would be a cruel injustice to the maker. The section should be materially changed. The real and commendable object of the section would be attained, without resorting to a fiction, by a provision as follows: "If a bill be drawn, or a note made, payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in the instrument, and if such bill or note be indorsed by the drawer or maker in the name of the nominal payee, the instrument will have the same effect as a bill or note payable to the order of, and indorsed by, the drawer or maker respectively."

SECTION 9-(5) provides that an instrument is payable to bearer "(1) where it is expressed to be so payable" and "(5) where the only or last indorsement is an indorsement in blank." The language of this sub-section (5), which is borrowed from section 8-(3) of the English act, is not well chosen. If it is to be taken as it stands, a note payable by A to the order of B and bearing the anomalous blank indorsement of C would be payable to bearer. This, of course, would be an absurdity, but it is certainly true that the only indorsement is an indorsement in blank. This objection apart, the sub-section means that, if an instrument is expressly payable to bearer, it continues to be so payable, although it afterwards be indorsed specially; but that, if an instrument payable to the order of a particular person has become payable to bearer by being indorsed in blank, it ceases to be payable to bearer, if afterwards indorsed specially. This distinction between instruments originally payable to bearer and instruments made so payable by indorsement in blank is illogical and undesirable, and probably was not contemplated by the framers of the English and American acts. There is still a third objection to this sub-section. If an instrument indorsed in blank and subsequently

indorsed specially, so that it is no longer payable to bearer, is transferred by the special indorsee by delivery merely, the transferee cannot sue parties prior to the special indorser in his own name, but only in the name of his assignor. This puts the assignee to unnecessary inconvenience. As owner of the instrument, although not, according to this sub-section, holder, he ought to have the right to strike out the special indorsement, thus making the instrument once more payable to bearer, and as bearer to sue upon it in his own name. The following substitute is suggested for section 9-(1) and 9-(5): "The instrument is payable to bearer

"(1) when it is expressed to be so payable;

"(5) when, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee."

"An instrument payable to bearer will, however, whenever it is indorsed specially, carry notice that the property in it was at one time vested in the special indorsee, so that, in the absence of an indorsement or assignment by him, all subsequent holders will hold for the benefit of such indorsee."

SECTION 20 provides that a person who purports to sign an instrument in behalf of a named principal is not liable on the instrument, if he was duly authorized by the principal. By necessary implication he is liable on the instrument, if not duly authorized.¹ This is a departure from the English act and from the almost uniform current of judicial decisions.² This new rule involves a flat contradiction of the instrument, and the fiction works not justice but injustice. For example: A, mistakenly believing that he is duly authorized, signs a note, "A, agent for B," and delivers it to C, the payee. At maturity B repudiates the note. He is, however, at that time a bankrupt. A is rightfully chargeable to C on his implied warranty of authority, but only to the amount that C might have recovered from B, if he had authorized the note. But, under section 20, A is liable to C for the face of the note.

By SECTION 22 the indorsement or assignment of the instrument by an infant "passes the property therein." Does this section, like the corresponding section of the English act, mean merely that the indorsee has the right to enforce payment from all

¹ Mr. Crawford so interprets the section. Crawford, An. N. I. L. 26.

² Hall v. Crandall, 29 Cal. 567; Noyes v. Loring, 55 Me. 408; Bartlett v. Tucker, 104 Mass. 336; White v. Madison, 26 N. Y. 117; Miller v. Reynolds, 92 Hun, 400. The case of Byars v. Doores, 20 Mo. 284, is *contra*.

parties prior to the infant, or does it mean that the indorsee becomes absolute owner of the instrument, so that he and his transferees, whether with or without notice of the infancy, may retain the instrument even against the infant? If it was intended to reproduce the effect of the English act on this point, it is unfortunate that the unambiguous language of that act was not retained. If, on the other hand, it was intended to make the infant's transfer of negotiable paper irrevocable, the section introduces a radical change in the law as to the rights of infants, and one that goes unnecessarily far in protecting an indorsee who knows that he is dealing with an infant.

SECTION 29 defines an accommodation party as one who has signed the instrument "without receiving value therefor and for the purpose of lending his name to some other person." By this definition one who has received a commission, which is certainly value, for lending the credit of his name would not be an accommodation party. But no business man or good lawyer would sanction such a distinction. The words, "without receiving value therefor and," should be cancelled as inaccurate and misleading.

SECTION 34 distinguishes between special and blank indorsements, but it is nowhere stated that an indorsement, like the drawing of a bill, is an order. If the payee writes, "I assign this note to B," or "I guarantee to B the payment of this note," is he liable as indorser on his assignment or guaranty? Is his transferee an indorsee, and therefore within the rule that gives a holder in due course the title free from equitable defences? There are numerous but discordant decisions on these points, and it is unfortunate that the new code does not secure uniformity here, as it does in the matter of notes payable with exchange or attorneys' fees.

SECTION 37 confers upon the indorsee under a restrictive indorsement the right to bring any action that the indorser can bring. Inferentially such an indorsee cannot sue his indorser. This is just, if the instrument was transferred to the indorsee for the benefit of the indorser. But unjust, if the indorsement was for value to the indorsee in trust for a third person.

SECTION 40, which has no counterpart in the English act, provides that an instrument indorsed in blank, although subsequently indorsed specially, "may nevertheless be further negotiated by delivery," the special indorser being liable of course "to only such holders as make title through his indorsement." If, for example,

the special indorsee lost possession of the instrument by accident or theft, and the finder or thief transferred it by delivery to one who had no notice of the loss or theft, the latter is entitled to charge all parties antecedent to the special indorser. Lord Kenyon ruled to this effect in *Smith v. Clarke*,¹ and his view was followed by the courts,² and was repeated in the text-books, in a form much resembling the language of the section under discussion.³ But Lord Kenyon failed to see that the special indorsement was notice that the instrument had become the property of the special indorsee, and that the right of any subsequent taker must be derived through him. To correct Lord Kenyon's error, and, as Mr. Chalmers tells us,⁴ "to bring the law into accordance with mercantile understanding," section 8-3 was inserted in the English act, which defined an instrument payable to bearer as one "which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank." This section of the English act is reproduced in section 9-5 of the American act, so as to change the law in this country also. Then, in apparent forgetfulness of the effect of section 9-5, the framers of the American act insert section 40, which changes the law back to its former state. One of these repugnant sections, and preferably section 40, should be cancelled.⁵

SECTION 49 gives to the transferee of an instrument payable to the order of the transferor, but not indorsed by the latter, "such title as the transferor had therein," and also "the right to have the indorsement of the transferor." If an indorsement was intended, but omitted through inadvertence, it is obviously just that the transferor should be required to indorse subsequently. If, on the other hand, the omission is not due to inadvertence, it is as obviously unjust, as Mr. Bigelow has pointed out,⁶ to compel the transferor to assume the liability of an indorser. In section 44 it is provided that any person under obligation to indorse

¹ Peake, 225; 1 Esp. 180, s. c.

² *Walker v. MacDonald*, 2 Ex. 527; *Savannah Bank v. Haskins*, 101 Mass. 370; *Houry v. Eppinger*, 34 Mich. 29; *Watervliet Bank v. White*, 1 Den. 608; *French v. Barney*, 1 Ired. 219; *Mitchell v. Fuller*, 15 Pa. 268.

³ Byles, Bills (13th ed. 1879), 152; Chitty, Bills (11th ed. 1878), 173; Chalmers, Dig. of Bills of Exch. (1878) 96.

⁴ Chalmers, Bills of Exch. (5th ed.) 24. See, also, Byles, Bills (16th ed. 1899).

⁵ The neutralizing effect of section 40 upon section 9-5 is recognized by the learned writer in 17 Banking Law Journal, 775, who adds: "More wrong than right, it seems to us, will follow the operation of the law as it now stands."

⁶ Bigelow, Bills and Notes (2d ed.), 295, n 1.

in a representative capacity may indorse in such terms as to negative personal liability. But there is no similar provision for a qualified indorsement in section 49. Such a provision should be added to this section.¹

There is a further objection to this section. If the transferee by delivery merely of an instrument payable to the order of the transferor always acquires only the rights of the latter, such a transferee of a note made for the accommodation of the payee could not enforce it against the maker, even though he might have given to the payee the money which it was the object of the maker to procure for the payee on the credit of his own name. Such a result would be a reproach to the law, even if due to the action of the courts. But this section, so far from codifying, actually nullifies the judicial precedents in this country.² This defect in this section would be cured by inserting after the word "addition" the words "the right to enforce the instrument against one who signed for the accommodation of his transferor and."

SECTION 64, defining the liability of the anomalous indorser, is an excellent piece of codification but for one slip. One not otherwise a party to a bill payable to the order of the drawer may sign it for the accommodation of the acceptor, as in *Matthews v. Bloxsome*.³ He should clearly be liable to the drawer-payee. But by the sub-section 2 he is liable only to parties subsequent to the drawer. This case may be provided for by making the first two sections read as follows:—

(1) "If the instrument is a note or bill payable to the order of a third person, or an accepted bill payable to the order of the drawer, he is liable to the payee and to all subsequent parties."

(2) "If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or payable to bearer, he is liable to all parties subsequent to the maker or drawer."

SECTION 65 introduces the distinction that the implied warranty of genuineness, title, and the like of the transferor by delivery

¹ The Colorado legislature, to remedy this injustice, before enacting this section, added to the sentence requiring an indorsement the words "if omitted by accident or mistake."

² *Hughes v. Nelson*, 29 N. J. Eq. 547; *Matthias v. Kirsch*, 87 Me. 523; *Meggett v. Baum*, 57 Miss. 22; *Freund v. Importers' Bank*, 76 N. Y. 352. See, further, the Scotch case of *Hood v. Stuart* (Court of Sess., March 20, 1870) and the analogous case of an accommodation bond, *Dickson v. Swansea*, L. R. 4 Q. B. 44, which greatly lessens the authority of *Edge v. Bumford*, 31 L. J. Ch. 805.

³ 33 L. J. Q. B. *Young v. Glover*, 3 Jur. N. s. 637, is a similar case.

inures to the benefit of his immediate transferee, whereas the similar warranty of the indorser without recourse runs in favor of all subsequent holders. This idea that the indorser without recourse is liable to any one but his transferee is an original invention of the Negotiable Instruments Law. But this is its only merit. To say that such an indorser is liable in any manner on the bill is to contradict the plain language of his indorsement. His liability is extrinsic to the bill. As the vendor of the bill, he, like the vendor of other personal property, is liable to his vendee, but to no subsequent purchaser, for the genuineness and title of the thing sold. His liability is therefore identical with that of the transferor by delivery. This view is brought out in almost all of the sixteen reported cases seen by the writer, in which an indorser without recourse was made a defendant. There seems to be no trace of authority for an action against such an indorser by any one but his immediate transferee. In one case¹ a subsequent holder attempted to charge the indorser without recourse, but the court decided against him, Mr. Justice Dillon delivering a convincing opinion, in which the indorsement without recourse was treated as creating the same liability as a transfer by delivery. Section 65 should be amended by adding in the first sentence after "warrants" the words, "as a vendor, and, therefore, only to the vendee," and by cancelling the sentence beginning with the words, "But, when the negotiation."

SECTION 66 betrays the same misconception in regard to warranty as the preceding section. One who indorses without qualification is liable as indorser to all subsequent holders. If he transfers the bill for value, he incurs the additional but extrinsic liability of a vendor. But this liability runs only to his indorsee as a vendee. These liabilities are quite distinct. As indorser, he cannot be charged until the maturity of the bill and after due diligence exercised by the holder. As warrantor, since the warranty is broken at the moment of transfer, if at all, he may be sued at once, before maturity, and without regard to presentment or notice.² An accommodation indorser is obviously not a vendor.

¹ *Watson v. Chesire*, 18 Iowa, 202. In *Challis v. McCrum*, 22 Kan. 156, Mr. Justice Brewer said: "Of course no action will lie on the indorsement, for by his written contract Challis expressly declines to assume the liability of an indorser. If sustainable at all, it must be against him as a vendor, and not as an indorser, and upon the doctrine of implied warranty."

² *Turnbull v. Bowyer*, 40 N. Y. 456; *Warren-Scharf Co. v. Com. Bank*, 97 Fed. R. 181; *Copp v. McDougall*, 9 Mass. 1; *Blethen v. Lovering*, 58 Me. 437 (*semble*).

The party accommodated fills that position. The accommodation indorser is, therefore, not liable as a warrantor, but is chargeable only as indorser upon the bill after maturity and due notice of dishonor.¹ Section 66, making an accommodation indorser liable as a warrantor, ignores an important distinction, nullifies sound decisions, and does injustice to the accommodation indorser by imposing upon him a liability which he never intended to assume, and which cannot be justified on any legal principle. Section 66 should be amended by omitting everything after "qualification" in the first line to the word "engages" in the first line of the last paragraph.

There is a further criticism to be made upon sections 65 and 66. The transferor by delivery or by a qualified indorsement not only warrants, in section 65-1, 2, and 3, the genuineness of the instrument, his title to it, and the capacity of prior parties, but also, by 65-4, "that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." Why should the knowledge of the transferor be irrelevant in the case of forgery, or capacity of prior parties, and yet be essential when the instrument is invalid because of usury or other statutory real defence, or, if the transfer is after maturity, by reason of payment, failure of consideration, or other personal defence? This subsection codifies the New York case of *Littauer v. Goldman*,² which is at variance with general judicial opinion,³ and has been spoken of by the court of a sister state as "admittedly supported by no precedent."⁴ This subsection would be consistent with the preceding subsections, if it read as follows: "That the instrument is subject to no real defence nor, if the transfer is after maturity, or after dishonor noted on the bill, to any personal defence." Furthermore, whatever be the final form of this subsection, there seems to be no reason why it should not be incorporated, by reference, in section 66-1, if the latter subsection is to be retained in any form.

¹ *Central Bank v. Davis*, 19 Pick. 373; *Susquehanna Bank v. Loomis*, 85 N. Y. 207 (distinguishing *Turnbull v. Bowyer*, *supra*); *Case v. Bradburn*, 1 Daly, 256. The same distinction between an accommodation indorsement and an indorsement for value is illustrated by *Leach v. Hewitt*, 4 Taunt. 731, and *Cundy v. Marriott*, 1 B. & Ad. 196.

² 72 N. Y. 506.

³ *Giffert v. West*, 33 Wis. 617; *Daskam v. Ullman*, 74 Wis. 474; *Hannum v. Richardson*, 48 Vt. 508; *Knight v. Lanfear*, 7 Rob. (La.) 172.

⁴ *Wood v. Sheldon*, 42 N. J. 421, 424. See a similar criticism in *Meyer v. Richards*, 163 U. S. 385, 411, 412.

SECTION 68 declares that "joint payees or joint indorsees who indorse are deemed to indorse jointly and severally." Joint makers, joint drawers, and joint acceptors are liable only jointly. Why this arbitrary discrimination? It would seem to be a blunder, that should be corrected by cancelling the last sentence of this section.

SECTION 70. "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument." This changes or would change the law, and for the worse, as to certificates of deposit, in Georgia, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, South Dakota, and Vermont.¹ Furthermore, presentment would not be necessary in the case of bank-notes circulating as money. The section should be amended by adding in the first line after "necessary" the words "except in the case of bank-notes and certificates of deposit."

SECTION 119-4. "A negotiable instrument is discharged by any other act which will discharge a simple contract for the payment of money." If a creditor accepts a horse in satisfaction of his claim, not yet matured, the simple contract claim is discharged. But if a holder accepts a horse from the maker before maturity, in satisfaction of the note, the note is not discharged. The accord and satisfaction gives the maker merely a personal defence, which is cut off the moment the note is transferred to a holder in due course. This subsection should be cancelled. It would be superfluous, even if it were accurate.

SECTION 120-3. "A person secondarily liable on the instrument is discharged by the discharge of a prior party." This subsection is the most mischievously revolutionary provision in the new code. It means that if the maker is discharged by the statute of limitations, all the indorsers are *ipso facto* discharged. It means that, if a joint note is executed by "A, principal," and "B, surety," and B dies, whereby the whole burden survives to A, all the indorsers are discharged. It means that if by some inadvertence due notice should not be given to the first indorser so that he would be discharged, all subsequent indorsers, although duly notified, would also be discharged. It would mean, but for the saving grace of section 16 of the National Bankrupt Law, that an indorser would be discharged if any prior party received his discharge in bankruptcy. The bankrupt law was not in force

¹ In California, Iowa, Michigan, Minnesota, and Wisconsin certificates of deposit need not be presented to charge the bank.

when the new code was recommended by the commissioners, nor when it was adopted by some of the states, and it may be repealed at any time. It is almost needless to say that there is nothing corresponding to this provision in the English act. It was doubtless developed by the draftsman from the peculiar New York case of *Shutts v. Fingar*.¹ The New York court had introduced in *Merritt v. Todd*² the novel doctrine that, to charge the indorser of a demand note in that state, it was not necessary, as it is in other jurisdictions, to present the note for payment within a reasonable time. *Merritt v. Todd* was followed, with reluctance, in subsequent cases. In *Shutts v. Fingar* the holder failed to present a similar note to the maker until after the latter was discharged by the statute of limitations, but claimed the right, under the authority of *Merritt v. Todd*, to charge the indorser by a presentment at any time. The court, however, declined to follow that case to its logical conclusion. While adhering to the doctrine that a presentment of a demand note need not be made within a reasonable time, they decided that such a note must be presented before the maker was discharged by the statute of limitations. This, it will be seen, is a totally different proposition from that of subsection 3. Since *Merritt v. Todd* has become obsolete through the adoption in New York of section 71 of the Negotiable Instruments Law, *Shutts v. Fingar* is now nothing more than a legal curiosity. This subsection should be stricken from the new code.

SECTION 120-5 and 6 declare that a release of the principal debtor or a binding agreement to give him time will discharge a party secondarily liable, unless the holder expressly reserves his rights against such party. There seems to be no sufficient reason, on the one hand, for inserting these doctrines of suretyship in a negotiable instruments code, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance. But the question of superfluity apart, these subsections are inaccurate in point of law. If the party primarily liable is an accommodation acceptor or maker, a release of him by the holder, or a binding agreement to give him time, does not discharge the accommodated drawer or indorser. The discharge of the drawer or indorser in such cases would be highly inequitable. The action of the holder cannot possibly prejudice them, for,

¹ 100 N. Y. 539. A paragraph from the opinion of Ruger, C. J. (p. 545), forms the staple of Mr. Crawford's note to this section. *Crawf. An. N. I. L.* 84, n. (a). See, also, *Crawf. An. N. I. L.* 84, n. (c).

² 23 N. Y. 28.

under no circumstances, would they, on paying the holder, have any right either by subrogation or indemnity against the accommodation acceptor or maker. The authorities are unanimous against the discharge of the party accommodated, although he is only secondarily liable on the instrument.¹ These subsections are not in the English act, and should either be eliminated from the American act or amended. Furthermore, if it is thought best to retain them in an amended form, another subsection should be added, to the effect that an accommodation acceptor or maker, although the party primarily liable on the instrument, will be discharged, if the holder, with knowledge of the accommodation, releases, or by a valid agreement undertakes to give time to the accommodated drawer or indorser. The authorities are almost unanimous on this point also,² although in a few jurisdictions the accommodation party must resort to equity for his relief. In the judgment of the writer, the wise course is to drop subsections 5 and 6 from the act.

SECTION 175 subrogates the payor for honor "to the rights of the holder as regards the party for whose honor he pays and all persons liable to the latter." This section is identical with section 68-5 of the English act. Since an accommodation acceptor is not liable to the drawer, one who pays for the honor of the drawer cannot charge such an acceptor. Lord Erskine so ruled in *Ex parte Lambert*,³ disapproving of Lord Loughborough's decision to the contrary in *Ex parte Wackerbath*.⁴ But in *Ex parte Swan*,⁵ Malins, V. C., condemned with some emphasis the doctrine of Lord Erskine, and *Ex parte Lambert* has since been regarded as an overruled case.⁶ In the face of this the English

¹ *Collott v. Haigh*, 3 Camp. 281; *Hill v. Read*, 6 D. & Ry. N. P. 26; *Sargent v. Appleton*, 6 Mass. 85; *Parks v. Ingram*, 22 N. H. 283. The following cases turn on the same principle: *Ludwig v. Iglehart*, 43 Md. 39; *Gloucester Bank v. Worcester*, 10 Pick. 528; *Bruen v. Marquand*, 17 Johns. 58.

² *Ewin v. Lancaster*, 6 B. & S. 571; *In re Goodwin*, 5 Dill. 140; *Hall v. Capital Bank*, 71 Ga. 715; *Lacy v. Lofton*, 26 Ind. 324; *Adle v. Metoyer*, 1 La. An. 254; *Guild v. Butler*, 127 Mass. 386; *Canadian Bank v. Coumbe*, 47 Mich. 358; *Meggett v. Baum*, 57 Miss. 22; *Westervelt v. Frech*, 33 N. J. Eq. 451; *T. N. Bank v. Hastings*, 134 N. Y. 501 (*semble*); *State Bank v. Smith*, 85 Hun, 200 (*semble*); *Shelton v. Hurd*, 7 R. I. 403. The opposite rule obtains in Pennsylvania and perhaps in Alabama. *Stevens v. Monongahela Bank*, 88 Pa. 157; *Wilson v. Isbell*, 45 Ala. 142. But even these states lend no support to the discharge of the accommodated drawer or indorser by a release or time given to the accommodation acceptor or maker.

³ 13 Ves. 179.

⁴ 5 Ves. 574.

⁵ L. R. 6 Eq. 344-365.

⁶ Byles, Bills (10th ed. 1874), 266, 277, and in later editions. Chitty, Bills (11th ed. 1878), 352. "The case of *Ex parte Lambert* is no longer law." 4 Am. and Eng. Ency. of Law (2d ed.), 499.

Bills of Exchange Act and the American Negotiable Instruments Law have codified the overruled opinion of Lord Erskine. Mr. Chalmers in his excellent treatise is careful to indicate every instance in which the English act modifies the previous law. But he gives no intimation that section 68-5 introduces any change. One must infer that he was unconscious of any change. This inference is confirmed by the first edition of his Digest,¹ published four years before the passage of the English act, in which he defines the right of the payor of honor in substantially the same language as that of the act. Mr. Chalmers's statement of the result of the decisions is in general so accurate that one wonders at this slip, which is all the more surprising, because in his Table of Cases Overruled he includes *Ex parte* Lambert as overruled by *Ex parte* Swan. Section 175 should be amended by substituting for "liable," the fourth word from the end, the word "prior." This amendment would make the section accord with the Continental Law,² with the California Code,³ and with mercantile understanding.

SECTION 186 provides that the failure to present a check for payment within a reasonable time will discharge the drawer "to the extent of loss caused by the delay," but makes no provision for the effect of not giving due notice of dishonor when the check has been presented but not paid. Such a case must therefore be governed by section 89, with the result that the drawer is absolutely discharged, although the laches in giving notice has not caused any loss to him. This is obviously an undesirable rule, and is an innovation of the English and American codification. The courts and the text-writers give the same effect to delay in presentment and delay in sending notice of dishonor.⁴

It remains to mention briefly the omissions in the Negotiable Instruments Law. The English act deals with the effect of the loss or destruction of a bill or note,⁵ defines the liability of the acceptor to the drawer,⁶ and the liability of parties in default for

¹ Page 192.

² French Code de Commerce, Art. 159, translated in 3 Rand. Comm. Paper (2d ed.), 2836; German Wechselordnung, sect. 63, translated in 3 Rand. Comm. Paper (2d ed.), 2800.

³ Sec. 3205, 3 Rand. Comm. Paper (2d ed.), 2727.

⁴ *Clark v. Nat. Bank*, 2 MacArthur, 249; *Griffin v. Kemp*, 46 Ind. 172; *Gregg v. George*, 16 Kan. 546; *Stewart v. Smith*, 17 Ohio St. 82; *Purcell v. Allemon*, 22 Grat. 739; *In re Brown*, 2 Story, 502; *Story, Prom. Notes*, § 493; *Dan. Neg. Inst.* (4th ed.) § 1587; 2 Benj. Chal. (2d ed.) 270.

⁵ Secs. 69, 70.

⁶ Secs. 57 (1), 59 (2 a).

interest, damages, and reëxchange,¹ and contains several provisions relating to the difficult subject of Conflict of Laws.² There is nothing in the American act on any of these topics. Neither act mentions the duty of the drawee of a check to honor it, if in funds, nor the effect of the failure of the last indorser to receive or to transmit notices of dishonor, duly mailed with the notice to himself, to be forwarded to prior indorsers.³ These omissions, although marring the symmetry of the new code, cannot be urged as fatal objections to its general adoption.

But if the preceding criticisms are well founded, the errors and imperfections of the Negotiable Instruments Law are so numerous and so serious that, notwithstanding its many merits, its adoption by fifteen states must be regarded as a misfortune, and its enactment in additional states, without considerable amendment, should be an impossibility.

Uniformity of amendment would be secured, and the passage by all the states of a judicious code of Bills and Notes would be accelerated, if the commissioners would reconsider the present Negotiable Instruments Law and submit it, in a revised form, with their approval, and if also they would suggest the form of supplementary legislation requisite to secure the necessary amendments in the states which have already passed the Negotiable Instruments Law. If this action on the part of the commissioners is found to be impracticable, it is hoped that the amendments proposed in this paper may commend themselves to the state legislatures. Fortunately the correction of many of the errors requires only the use of scissors.

In pointing out the defects in the new code the writer must not be understood as criticising either the zeal or the skill of the commissioners. They made a mistake, it is believed, but not an unnatural one, in view of the novelty of the work, in not securing an abundance of competent criticism, both public and private, from widely different sources, before issuing with their sanction the final draft of the proposed law. To the lack of adequate criticism must be ascribed the shortcomings of the Negotiable Instruments Law.

JAMES BARR AMES.

¹ Sec. 57 (1), (2), and (3).

² Sec. 72 (1), (2), and (3).

³ Such failure discharges the prior indorsers according to *Aldine Co. v. Warner*, 96 Ga. 370; *Van Brunt v. Vaughan*, 47 Iowa, 145 (*semble*); *Stix v. Matthews*, 63 Mo. 371, 375. But *Wamesit Bank v. Buttrick*, 11 Gray, 387, is *contra*.

A DEFENSE OF THE NEGOTIABLE INSTRUMENTS
LAW.¹

BY LYMAN D. BREWSTER,

PRESIDENT OF THE NATIONAL CONFERENCE ON UNIFORM LAWS.

IT was with great pleasure that a sub-committee of the Conference of Commissioners on Uniform State Laws had the privilege of discussing the Negotiable Instruments Law with Professor James Barr Ames, the Dean of the Harvard Law School.

He had kindly consented, on request, to meet with us, at the annual session, at Saratoga, in August last.

It was with no less pleasure that, after two or three days' re-examination of the Act, with reference to the criticisms of the Dean, we were able to report that, in our judgment, no change in the Act was needed, and to have that report, after full explanation of the points discussed, unanimously approved by the Conference.

As the Dean has, with great courtesy, given us in advance substantially the same strictures to be published in the Harvard Law Review for December, 1900, it was suggested by members of the Conference that I should state in reply the reasons why the Conference did not adopt the views of the Dean. Finding that the Harvard Law Review could not publish a reply until late in the winter and that the Yale Law Journal could do so in January, I have availed myself of the early opportunity afforded of publishing it in this journal.

It is with diffidence that I undertake to reply to legal criticisms from such a source and upon such a subject. The Dean of the Harvard Law School has so long been, not merely an expert, but an authority, on this subject, that I would not rashly volunteer to attack his positions. But sometimes the point of view is quite as important as extensive knowledge, and I am constrained to believe that so keen a controversialist is somewhat affected by that "*gaudium certaminis*" which the most open-minded advocate cannot wholly resist. Then too, if it is a question of experts, nearly all of them disagree with the Dean, on the main points at issue, as I shall try to show. If it is a question largely of prac-

¹ Reprinted, by permission, from 10 Yale Law Journal 84.

tice and experience as a trier of cases, Professor Ames has none — while, on the other hand, on all questions of custom and convenience the practical knowledge of the hundred lawyers, and more, who framed the Negotiable Instruments Law, and the hundred bankers who adopted it, would seem to quite offset the mere conclusions of erudition.

One who, like Professor Ames, can approach the consideration of a legal subject from the purely academic point of view, unembarrassed by any preconceptions derived from practice at the bar, has a certain advantage in that the matter may present itself to his view in scientific arrangement and symmetry from the first. Yet, on the other hand, the want of just that every-day familiarity with commercial affairs and business men, which every lawyer in considerable practice necessarily acquires, sometimes unfits the mere scholar or book lawyer to see things as others see them, and may make him give undue weight to what is really of little or no importance. Accustomed to deal only with theoretical questions and to measure law by ideal standards, such a man may demand a fulness of expression which amounts to prolixity, and discern obscurities where to the ordinary lawyer or merchant everything would seem plain and simple.

But such questions are not settled by the "Rule of Thumb," or a majority vote, and the Negotiable Instruments Act must stand on its own merits. It is a great good fortune to all concerned to have it tested by so great an expert.

Now as to the tests.

It is my purpose to devote this paper to answering the specific objections submitted in the Dean's article, grouping them as far as possible for the sake of brevity.

As five of the more important strictures are equally strictures of the English Act, which has been the Law of England since 1880, the language being the same in both acts, the five can conveniently be considered together.

They are criticisms of sections 3-2, 9-5, 9-3, 29, 70. These sections in the Negotiable Instruments Law contain the following propositions:

(a) That a promise is not rendered conditional by "a statement of the transaction which gives rise to the instrument."

(b) That an instrument is payable to bearer though it is "payable to the order of a fictitious person" — or payable to bearer;

(c) "Where the only or last indorsement is in blank."

(d) That "an accommodation party is one who has signed the instrument as maker, acceptor or *indorser* without receiving value therefor and for the purpose of lending his name to some other person."

(e) "That presentment for payment is not necessary in order to charge the person primarily liable on the instrument."

Answer. First, as a matter of authority, I know of no text book on bills and notes or any encyclopædia of law that does not hold the above propositions to be axioms of commercial law. They are sustained by a multitude of cases. Secondly, as to the inconveniences therefrom apprehended by the Professor, it is enough to say that none such have apparently arisen in England during the experience of twenty years, nor are any such apprehended by the bankers of this country, who, after giving the matter very critical attention, have given their cordial approval of the law. Perhaps a more specific discussion of two of these five strictures, applicable to both the English and American Acts, will answer for a more minute criticism of the others. One is the critique on Sec. 29, and is as follows:

"Sec. 29 defines an accommodation party as one who has signed the instrument 'without receiving value therefor and for the purpose of lending his name to some other person.' By this definition, one who has received a commission, which is certainly value, for lending the credit of his name, would not be an accommodation party. The words 'without receiving value therefor and' should be cancelled as inaccurate and misleading." The only difference I have been able to find between the language of the two Negotiable Instruments Laws and that of the ordinary definitions is that more of the text books and cases seem to use the words "without consideration" than the words "without value received." But as these expressions are made synonymous by the definitions in the Negotiable Instruments Law, Sec. 191, all the text books and modern cases agree with the Negotiable Instruments Act, as to absence of consideration. The definition in the Negotiable Instruments Law is the definition given in the new edition of the American and English Encyclopædia of Law, Vol. I, pages 335-6.

This article is a very full and complete discussion of the subject, containing fifty-eight pages on accommodation parties alone. Daniel is to the same effect. 1 Daniel 189. So also Tiedeman, Sec. 158. Byles on Bills, star paging 131. 2 Randolph 472.

Norton's Horn-Book (1900) 176. Bigelow, second edition, cites the definition given by the Negotiable Instruments Law as the true definition. On page 336 of the second Encyclopædia, *supra*, the language is, "there must be an absence of consideration between the accommodated and the accommodation party." Rawle's Bouvier's definition is "Bills or notes made, accepted or indorsed without any consideration." Not only do the opinions of the judges, text books, statutes, codes, and the law dictionaries agree on this point, but it is worthy of notice that the last leading lexicons agree exactly with the definition of the Negotiable Instruments Law so far as absence of consideration is concerned. (See last Standard and Webster *ad verbum*.) The only reason given for the overthrow of all these authorities is an illustration intended apparently to demonstrate the difficulty of showing what is value and what is not, but which in reality indicates value on its face. What is there "inaccurate and misleading" in a definition universally adopted?

Sec. 3-2, which provides that "an order or promise is not rendered conditional by the addition of a statement of the transaction, which gives rise to the instrument," is objected to as "unmeaning" and "nullifying several decisions." Here, as before, the text books and modern cases are almost unanimously against the Dean.

The instance cited by him of a note "given as collateral security" contains notice upon its face that the note is not an unconditional promise to pay, but conditional upon the non-payment of the principal debt. (See Sec. 1, Par. 2.)

The provision was intended to cover such transactions as a "chattel note," in order to unify the law, which has been held differently, as Dean Ames shows in the cases which he cites. The decision in New York, cited by him, to prove that the Negotiable Instruments Law did not cover such a note, *Third Bank v. Spring*, 28 N. Y. Mis. 9, has since been reversed, s. c. 63 N. Y. Supp. 410, although the Appellate Division did not base its reversal on the terms of the act. The latter decision, therefore, implies that the terms of the act have not changed the law in New York. How the provision is "obscure, inartistic and useless," as claimed by the critic, does not appear. That it is not very "obscure" seems certain or some question would have arisen under it in twenty years. Good, clear, plain English would seem to be "artistic" enough for the language of a statute. A single

line which settles many discordant decisions would not ordinarily be termed "useless" or, on any interpretation, "mischievous."

The other three propositions, "*b*, *c*, and *f*," can easily be tested in the same way by reference to the same standard authorities. In fact I do not see how any good practical commercial lawyer could regard them as questionable. I shall not lumber up this reply with scores of citations of cases. The text books on these plain propositions are fully supported by the cases cited by them.

But I must condense. Of the sections of the law criticised by the Dean other than "*a*" and "*d*," already considered at length, I can best justify the conclusions of the Conference by repeating, as near as can be remembered, the offhand answers given at the time of the friendly discussion aforesaid. The fullest notes are those of Chief Justice Stiness of Rhode Island, who was chairman of the sub-committee, and has favored me with the privilege of using them. I have used them freely, making only such necessary changes as any new point in the Dean's Harvard article suggests. I take these notes in the order of the criticisms made by the Dean. The general soundness and practical wisdom of these answers, or rather of the propositions they defend, will, I believe, be confirmed by a careful examination of the best authorities.

Sec. 36-2-3. The point here made is that there is no difference between an agent and a trustee, because the agent would collect for the benefit of his principal. Hence "2 and 3 should be consolidated." All agents are, in a sense, trustees, because they are ultimately accountable to the principal. But all agents are not technically trustees. The distinction between an agent and a trustee is embodied here for the purpose of relieving a plaintiff from proving an actual trust, which would be necessary under Professor Ames' proposed substitute. A general agent might be authorized to use money quite differently from a trustee.

Sec. 137. This section holds the destruction of a bill, or a refusal to return it, equivalent to an acceptance. He concedes that a drawee, so misconducting, should be liable for a conversion. A destruction or refusal to deliver a thing is, in law, a conversion. The Dean says this section makes a refusal to accept, an acceptance, and adds, "such a perversion of language would be strange enough anywhere, but in a deliberately framed code is well-nigh inexplicable." Surely this is a mere play upon words. There has been no "refusal to accept," simply a "refusal to return

within twenty-four hours." This provision was adopted in New York by statute fifty years ago.

Sec. 9-3 is criticised because it holds a note, payable to a fictitious or non-existing person, as payable to bearer. If one issues his note to a fictitious person, why should it not be treated as a note to bearer, for there is no one who can indorse it? Surely it is more logical to hold that a note, which purports to be payable to a person, when there is no such person and the maker knows it, must have been intended to be payable to bearer, than to hold that somebody must assume the name of such fictitious person, and make a false indorsement in order to give title to the note. The case supposed by Dean Ames, of a thief stealing such a note and the consequent hardship upon the maker of liability on the note as payable to bearer, when he would not be liable, because of incompleteness, if an indorsement were required, would be a rare one. His criticism seems to imply that the Act should cover rare and imaginary exceptions rather than serve the commendable purpose, which he concedes that the section has, of providing for common cases, such as notes payable to unincorporated associations, estates of deceased persons, and the like. Under his proposed substitute, if the maker completes the indorsement the same result would follow as without it. In either case, the familiar rule, that where one of two innocent parties must suffer loss, it should fall on him who has given the occasion for it, seems to be far short of "cruel injustice." There has been a variety of decisions in regard to stolen notes. 1 *Dan. Neg. Inst.*, chap. 26, 4th ed. This section would result in a definite rule; and, being in the line of aiding negotiability, a rule which puts the loss on a man who makes notes, for fun or fraud, and leaves them so that they can be stolen and issued, rather than on one who, in due course, has taken a maker's written promise to pay, seems to be a just one. The honesty of one's holding can always be examined.

Sec. 9-5. The first objection is that it covers a note payable to B and indorsed by C in blank. Such a construction is impossible. The section clearly means that a note duly transferred and indorsed in blank, is then payable to bearer; a proposition too clear for argument, so long as the indorsement remains in that form. As Dean Ames says: "It ceases to be payable to bearer if afterwards indorsed specially." The reason why such a rule is "illogical and undesirable" is not clear. The third objection is that if, after a special indorsement, the note is transferred by delivery,

the transferee cannot sue parties prior to the special indorser in his own name, but only in the name of his assignor. This is an assumption not contained in the Act. On the contrary, the effect of Par. 40, which authorizes a transfer by delivery, seems to give the transferee a right to sue in his own name, otherwise the note would not be "negotiated" within the meaning of the Act. The only limitation is that the person indorsing specially is liable as indorser only to such holders as make title through his indorsement. The proposed substitute appears to mean exactly what the Act means, since Par. 48 gives the right to strike out any indorsement not necessary to title. See also Par. 34 of Negotiable Instruments Law.

Sec. 20. The case supposed in the objection fails to show injustice. It is, if A signs a note as agent for B, mistakenly believing that he has authority, and B, a bankrupt, denies the agency, the payee should only recover from A what he might have recovered from B, the bankrupt, whereas the Act makes A liable for the face of the note. The plain answer is that one signing a note as agent for another should know and be able to show his authority. If he signs without authority, he alone in fact, and so in law, is the maker of the note, and he should be held liable accordingly.

Sec. 22, as to an infant's indorsement, is the same as in the English Act, except that the words "passes the property therein" are used in place of the words "entitles the holder to receive payment of the bill and to enforce it against any other party thereto." As the scope of the Act is confined to negotiable instruments, it does not otherwise affect the law relating to infants. Hence, the words of the two acts are equivalent in meaning, with the advantage of conciseness in the American Act.

Sec. 34 follows the English Act. Dean Ames puts the question whether if the payee writes: "I assign this note to B, or I guarantee to B the payment of this note," he would be liable on his assignment, or guaranty, and regrets that the Act does not answer the question. The liability of a party on a peculiar indorsement, which is outside of negotiability, must be settled by a court.

Sec. 37-2. The supposed injustice of this subsection, in case the indorsement was for value to the indorsee in trust for a third person, is not apparent.

Sec. 40 is claimed to be repugnant to Par. 9-5, but this is not

so. 9-5 declares a note to be payable to bearer when its last indorsement is in blank; 40 relates to a note where the last indorsement is special, and provides that it may then be transferred by delivery, in order to cover cases of good faith where title is frequently passed in that way, by persons ignorant of mercantile usage. In the case of a theft of a note from a special indorsee, which Dean Ames supposes, what harm can result? As before stated, the section validates a transfer by delivery, without the indorsement of the special indorsee, and so gives the holder a right to sue in his own name. This plainly implies proof of delivery from the owner, which would protect the parties in case of loss or theft of the note.

The first sentence of Sec. 40 is as follows:

“Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.”

Sec. 9-5 reads:

“The instrument is payable to bearer: . . . when the only or last indorsement is in blank.”

The Dean's stricture on the assumed repugnancy of these two sections begins, “Sec. 40 . . . provides that an instrument *indorsed in blank*, although subsequently indorsed specially, may nevertheless be further negotiated by delivery.” But as a comparison shows, Sec. 40 does *not* refer to an “instrument indorsed in blank,” but to an instrument “*payable to bearer*.” The supposed inconsistency of the two sections arises entirely from the mistaken quotation of the learned Dean.

The first sentence of Sec. 49 is as follows:

“Where the holder of an instrument payable to his order transfers it for value, without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition, the right to have the indorsement of the transferor.” This section gives the transferee such title as the transferor had and the right to have an indorsement.

This is quite right. The holder in such a case, not taking title in the usual way by indorsement, may well be charged with notice of any defect in the title to the note, or of equities between the parties. The clause giving the right to require an indorsement could only be enforced in equity, upon proof of an agreement to that effect. Hence, the words added in the Colorado statute, “if

omitted by accident or mistake," were unnecessary. An indorsement so enforced would complete the title and thus cover the case of hardship which Dean Ames supposes. All cases of possible equities cannot be covered by legislation.

Sec. 64 provides that one, not otherwise a party to an instrument, who puts his signature thereon before delivery, is liable as an indorser. It is to cover cases where persons put their names on the back of notes before delivery, and where they have been variously held to be indorsers, guarantors and joint makers. The section makes the rule that he shall be liable to all subsequent parties. Dean Ames says he should be liable to the maker or drawer whom he has accommodated with his signature, in cases where the maker or drawer is the payee. Apparently, his idea is that if he is not liable to the drawer-payee, no title can be passed by the latter. But subsection 2 makes the party liable as indorser to all parties subsequent to the maker or drawer. The Dean's proposed substitute would defeat the purpose of the Act, which is to put the irregular party into the place of the indorser, by making him practically a joint promoter, because his signature would precede that of the indorser.

Sec. 65 makes a person, who transfers a note by delivery or by a qualified indorsement, warrant certain things. It then says: "But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee." Dean Ames objects that this last clause makes the warranty of the indorser, which is that of a vendor, run in favor of all subsequent holders, which he says is "an original invention of the Negotiable Instruments Act. But this is its only merit."

The Dean is unjust to himself. In 2 Ames, Cases on Bills and Notes, Index under head of "Indorser without recourse," 840, 882, is this syllabus: "An indorsement without recourse, like a transfer by delivery merely, being, in substance, a sale, the indorser is responsible to the indorsee *and subsequent holders* for the validity of the title and the genuineness of the instrument which he purports to sell." The selected case is *Blethen v. Lovering*, 58 Me. 240. It was not a case of subsequent parties, but the long note appended to it does not in this respect distinguish the case from the syllabus in the index.

The same rule is stated so far as relates to a qualified indorsement in Fourth Am. & Eng. Encyclopædia of Law, second edition, 481, in almost the same words, and in 1 Daniel on Negotiable In-

struments, fourth edition, Par. 670, the language is: "The holder may sue the indorser." This is enough to show that the framers of the Negotiable Instruments Law must disclaim the credit of the invention which is accorded to them.

In the new Norton on Bills and Notes (Horn-Book Series), page 167, the editor gives the subsection in question from the Negotiable Instruments Law as the true law on qualified indorsements, quoting 2 Ames, Cases on Bills and Notes, 840, 882, as his authority. He seems to doubt, however, whether, among the conflicting cases, it was the law before made so by the Negotiable Instruments Law. He also thinks that the law laid down by Professor Ames in the passage above quoted that the warranty of the transferor by delivery also extends to subsequent parties, while not accepted as law elsewhere, ought to be the law. So that, instead of being guilty of the heinous crime of "novelty," the Negotiable Instruments Law is, on this matter, more conservative than either the Norton Horn-Book or Dean Ames' leading cases, where it lays down the rule, that "when negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee." The reasonableness of making a distinction between a transferor by delivery and an indorser without recourse, because in one case the name is on the paper and in the other is not, may or may not be doubtful. Norton's Horn-Book, Sec. 79, says they stand "much upon the same footing"; Dean Ames says their liability is identical. But that a certain and definite rule should be adopted, nobody can doubt.¹

Sec. 66 is more explicit and does make a change in the law, but it is in the line of aiding negotiability. It follows the English Act (Par. 55) in holding an indorser liable to a holder in due course, as to genuineness and regularity, and extends the liability only as to the warranty that the note was valid at the time of his indorse-

¹ On this point I have cited chiefly the new Norton Horn-Book, on Bills and Notes, just edited by Mr. Francis B. Tiffany, not only because it is one of the ablest and most interesting discussions on this special point, but because the editor seems to have taken most of the new matter in the book equally from the Negotiable Instruments Law and Professor Ames' Leading Cases on Bills and Notes. The preface says: "The present editor wishes to express his great obligation to Professor Ames, whose Index and Summary at the end of the cases, unquestionably the most important contribution to the subject that has been made in America, he has constantly consulted." It is hence doubly reassuring to note that, with so orthodox an authority for "constant" reference as the Leading Cases on Bills and Notes, Mr. Tiffany quotes a score of definitions bodily from the Negotiable Instruments Law, and, so far as I have observed, does not seem to disagree with its statement of law on any point.

ment. As a note usually gets its strength from the names of its indorsers, it seems to be just that the warranty should be included, if, indeed, it really adds anything to the English Act.

Sec. 68 treats joint-payers and indorsers, who indorse, as indorsing jointly and severally. Theoretically, this may, as the Dean says, "seem to be a blunder." But, practically, it is a convenience in suing, and was, doubtless, inserted for that purpose.

Sec. 70 provides that presentment for payment is not necessary to charge the person primarily liable on the instrument. The section was intended to apply to the maker of a note, who, of course, is liable if he does not pay according to its tenor. But, the Dean says, "it should except the cases of bank notes and certificates of deposits." In view of the fact that no person would be likely to bring a suit on such instruments when he could get the money at the bank, and the further fact that no harm could come to the promisor, excepting as to costs, which are in most, if not all the States, subject to the discretion of the court, the objection does not seem to be practical.

Sec. 119-4 provides that an instrument is discharged by an act which will discharge a simple contract for the payment of money. The objection is that if the holder of a note accepts a horse in satisfaction, before maturity, and then transfers the note, the maker is still liable. The section evidently relates to acts between the parties. If the maker allows his note to remain outstanding, and so to be transferred, of course he should be held liable.

Sec. 120-3 discharges a person secondarily liable by the discharge of a prior party. This too, evidently, means some act between the parties. The law has long been settled that the discharge of the liability of a bankrupt maker of a note does not affect the liability of the other parties on the note. It is generally held that the statute of limitations against an indorser runs, not necessarily from the date of the note, but from the time when the indorser's liability accrues. When, therefore, the language of subsection 3 is used (exactly as given in a number of the text books), it of course refers to a discharge by the holder and not a discharge by act of the law, as the whole context, referring to acts of the parties and not to any acts of the law, clearly indicates. Thus Randolph, second edition, Sec. 769, says "the release of a prior indorsement discharges subsequent indorsers," assuming of course their release by the holder. That this is the natural meaning and interpretation of subsection 3, Sec. 120, is fairly infer-

able from this fact. Ten books on commercial paper have been published since the Negotiable Instruments Law was legislatively adopted. All of them treat more or less fully of that law; Huffcut, Randolph, Bigelow, Norton, generally, and Selover and Crawford and the special books on the New York and Colorado Acts, treating of that Act alone. Not one of these ten authors intimates that subsection 3 has changed the law in the slightest degree. In all the reports of the various Commissioners to their respective States, elaborately stating every change of law made by the Negotiable Instruments Law, no allusion is made to subsection 3.

It is not necessary in this instance to invoke the aid of the rule of law stated in Sutherland on Statutory Construction, Sec. 156, that codes which condense and reaffirm in general the rules of the common law, do not repeal the exceptions to these rules which they reaffirm; or the similar doctrine in Endlich on Statutes, sections 127-205, that in statutes or revisions condensing or in general re-stating the common law, no change is presumed except by the clearest and most imperative implication.¹ How far this doctrine is carried in England, in regard to the Bills of Exchange Act, is shown in the case of *Bank of England v. Vagliano*, L. R. 1891, Appeal Cases, page 144. But were this doctrine invoked the simple application of the rule or of Sec. 196 would at once relieve the subsection in question of the misinterpretation put upon it by the Dean. Nevertheless our critic, whose adjectives here and there are surprisingly vigorous, describes this aphorism of the Law Merchant as "the most mischievously revolutionary provision of the new code."²

As to subsections 5 and 6 of Sec. 120, the objection of inaccuracy is based upon the case of an accommodation drawer or

¹ Because of the necessity of preserving this presumption in all its integrity, the sub-committee declined to accept some slight changes proposed by the Dean, such as adding to subsection 120-3 the words "by the holder." It would be (1) assuming a doubt where we had no doubt, and (2) assuming the doctrine from Sutherland and Endlich, *supra*, not to be true. A doctrine without strict adherence to which codes would have to be as long as text-books.

² The reasons attributed by the Dean for one or two of the changes of the law, made in the Negotiable Instruments Law, are, I think, misapprehensions. I expected to have received from Mr. Crawford, the draftsman, a paper stating the real grounds for such changes, in his own mind, but pressure of business on his part has prevented him from rendering any assistance during the brief time allowed for the preparation of this article, and the same is true of my colleagues on the committee. So the responsibility for any heresies in this paper must rest on my own shoulders.

indorser, because he says that the authorities are unanimous against the discharge of the party accommodated. Undoubtedly that is so, and it is difficult to see how the law could be construed to cover such a case. The law is intended to set out the legal liability on the instrument as such, in the due course of commercial transactions. It could never be held to mean that a party who had paid money for another's accommodation could not, at law, if not on the instrument, recover it back. That is a matter between the parties, entirely outside of the effect of the instrument in the hands of a holder.

Sec. 175 is the same as in the English Act, and whatever may have been the difference in English decisions, it was, doubtless, deliberately adopted, and certainly it seems to be just. One who pays for the honor of the drawer is as much an accommodation party as the accommodation acceptor and has no equity superior to that of the latter. But even if Mr. Chalmers and Mr. Crawford are wrong in preferring the law of Lords Kenyon and Erskine to that of Lord Loughborough, and Malins, V. C., now that Lord Kenyon's ruling is the law of Great Britain, and has been followed in several of the States (see cases cited in note 2, page 499, vol. 4 of second edition of Am. & Eng. Ency. of Law) and as uniformity is one of the main objects of the Negotiable Instruments Law, no mistake is made in leaving Sec. 175 as it stands.

Sec. 186. The objection is that, under Par. 89, upon presentment and dishonor notice must be given to the drawer of a check or he will be discharged. Suppose it is so, technically, with reference to the check itself. What is the harm? The debt is not discharged, except for laches. The holder can sue on his debt just the same as he could have done before the check was given. In some States a check is not held to be enough of a negotiable instrument to sustain an action. It is held as an order, with no promise to pay. The section seems to be harmless in any view.¹

¹ One would like to accept the challenge on page 244 in the Dean's article on the true theory on which a code on negotiable instruments should be made. Although this to be sure is rather a criticism of Chalmers and Herschell, Selborne and Bramwell, than of Mr. Crawford and the Conference. One would also like to explain why the subject of "Conflict of Laws" and some other subjects suggested by the Dean as omissions, "marring the symmetry of the new code," were properly omitted in so short and compact a statute, which it was hoped would be adopted by all the States and so leave much less inter-State conflict. But the space given me does not permit.

So much by way of comment on the criticisms of the Dean. It is quite possible that on some of the more technical and academic criticisms we have above discussed, the weight of authority or the true theory of the Law Merchant may be on the side of the critic. But let any candid reader carefully go over the "salutary changes" and "settlements of controverted questions" (and he might have added twice as many more) so admirably stated by the Dean in the commencement of his article, and the defects he assumes (if they are defects) are like spots on the sun. It takes an expert to see them, and he must use glasses at that.

In conclusion, our critic remarks that "if the preceding criticisms are well founded, the errors and imperfections in the Negotiable Instruments Law are so numerous and so serious that, notwithstanding its many merits, its adoption by fifteen States must be regarded as a misfortune." May we not say in reply that if the Dean's criticisms are *not* well founded, especially if, in fact, they have *no practical basis at all*, its speedy adoption by all of the States would be, as Lord Herschell has expressed it, "a boon to the commercial communities of both nations."

The critic relieves the severity of his adverse conclusion by stating that the Commissioners made a mistake in not securing an abundance of competent criticism, both public and private, from widely different sources, before issuing with their sanction the final draft of the proposed law. It is enough to state in reply that no statute in the English language, so far as I know, has received a tithe of the elaborate work laid out on the Negotiable Instruments Law. I have described before in this journal (6 Yale Law Journal, February, 1897, page 132) how the preparation of the original law involved the work of more than one hundred trained lawyers, the coöperation of the mercantile community for years in its evolution, and its critical consideration by both Houses of Parliament. In this country, it has had the criticism of lawyers in the Commissions from thirty-two States, who had it in consideration for more than a year during its preparation, and of leading text writers and teachers on the subject of bills and notes, including from Massachusetts alone Professors Bigelow, Williston, and Bennett, the well-known law writer, Leonard A. Jones, and the author of "American Statute Law," Mr. F. J. Stimson.

Six months before its adoption, copies were sent to many of the law schools (it was supposed to all), and to all of the known writers on bills and notes in the country. It has been adopted as

a text book in several law schools. It has been recommended for adoption by the Supreme Courts of South Carolina and Rhode Island in their opinions, before it was adopted by their Legislatures, and so far as I know it has yet to meet its first adverse criticism from any of the Courts in the seventeen extensive jurisdictions where it has been adopted. It has been critically examined and thereafter recommended by the very able committees of the New York City Bar Association and the Pennsylvania Bar Association, and by the Judiciary Committees of over twenty States. With this unqualified indorsement of its value, is it unreasonable to anticipate its acceptance before many years by all of the States of the Union?

But wherever passed, it should be passed without any alteration whatever, exactly like the original code recommended by the Commissioners, word for word. Otherwise, the discrepancies of supposed uniformity would be almost as bad as the present diversity. Once passed, it should not be changed until some Court of authority has indicated the desirability of a change, or some convention of bankers or merchants has indicated where the demands of modern business require a change.

LYMAN DENISON BREWSTER.

THE NEGOTIABLE INSTRUMENTS LAW.¹
A WORD MORE.

BY JAMES BARR AMES.

UNDER ordinary circumstances Judge Brewster's "Defense of the Negotiable Instruments Act" in the Yale Law Journal for January would be allowed to close the very friendly controversy begun by a criticism of that Act in the December number of this REVIEW. But it is so much wiser and simpler to avoid the commission of legislative errors than to correct them subsequently that the writer deems it his duty to add to his former paper this short supplement by way of meeting some of the arguments of the learned Chairman of the Committee on Uniform Laws, and of reinforcing some of his own criticisms.²

As to the objections to sections 20, 36-2 and 3, 49, 66, 68, 137, and 175 it seems unnecessary to say anything more than that his criticisms still seem to the writer to be valid. In dealing with the other sections criticised, he will follow the order of the Act.

By SECTION 3-2 an order or promise is not rendered conditional by "a statement of the transaction which gives rise to the instrument." These very general words, Judge Brewster tells us, were intended to cover the specific case of a "chattel note," that is, a note stating that it "is given for a chattel which is to be the property of the holder until the note is paid." He tells us further that this subsection could not apply to a note containing the words "Given as collateral security for A's debt to the payee," because such an instrument "contains notice on its face that it is not an unconditional promise to pay." But that is the precise ground upon which "chattel notes" are held to be non-negotiable in Massachusetts. In *Sloane v. McCarty*,³ Field, J., said: "The obligation of the defendant to pay the money is in legal effect

¹ Reprinted from 14 Harvard Law Review 442.

² Since the sections criticised and the criticisms must stand or fall upon their intrinsic merits or demerits, any allusion to the critic's qualifications by reason of his previous training or experience would seem to be irrelevant. But since the learned Chairman draws therefrom the inference that "a fulness of expression amounting to prolixity" would be demanded, in order to give effect to the writer's strictures upon the Act, it is right to say that the adoption of his proposed amendments would shorten the Act by something more than a dozen lines.

³ 134 Mass. 245, 246.

conditional upon the title vesting in him when the money is paid in full, and this condition appears on the face of the contract." The learned Chairman demonstrates, therefore, by his own reasoning, that this subsection must fail to work in the very case for which it was framed.¹

SECTION 9-3. Fictitious payee. In his criticism of this provision the writer tried to make it clear that, as a matter of actual experience, one who makes an instrument payable to a fictitious person always indorses it in the name of that person before issuing it, and that such an instrument is in effect, though not in form, the same as one payable to the order of the drawer or maker. By the Revised Statutes of New York, of 1830, a note payable to the order of the maker was declared to be payable to bearer, and was negotiable by delivery merely, without indorsement. This legislation was copied in at least nine states.² But it has been repealed in New York, North Dakota, Oregon, and Wisconsin by section 184 of the Negotiable Instruments Law, which declares that a note payable to the maker's own order "is not complete until indorsed by him." The recommendation of the writer is that a bill or note payable to the order of a fictitious person be dealt with in the same way by enacting that such a bill or note, when indorsed by the drawer or maker in the name of the fictitious person, but only when so indorsed, shall have the effect of paper payable to the order of, and indorsed by, the drawer or maker. Suppose two notes, one payable to the order of a fictitious person and one payable to the order of the maker, but neither of them indorsed, to be lost or stolen and to come to the hands of an innocent purchaser. Where is the logic or the justice in a statute which makes the maker liable in the one case, but not in the other?³

¹ It may be, as the writer believes it to be, an error to regard a "chattel note" as a conditional promise. But courts which commit this error will probably agree with Judge White, the only judge who has passed upon section 3-2, that this provision "has no application" to such a note. On this point Judge White's opinion was not impeached by the reversing opinion in 50 N. Y. Ap. Div. 66.

² Rand. Neg. Pap. (2d ed.) sec. 153 n., 401.

³ If Judge Brewster's startling suggestion that notes payable to the order of unincorporated associations or the estates of deceased persons are payable to bearer by force of this section 9-3, this provision is far more mischievous than the writer had supposed. Is a note payable to the order of a joint stock company unincorporated, or to the order of John Smith & Co., for a partnership is an unincorporated association, payable to bearer? This is incredible. There is a *dictum* in *Lewisohn v. Kent*, 87 Hun, 257, that a note payable to the order of the estate of A is payable to bearer. But surely it is a perversion of language to call the payee in such a note a fictitious or non-existing person. In *Shaw v. Smith*, 150 Mass. 166; *Peltier v. Babilon*, 45 Mich.

SECTIONS 9-5 and 40. Special indorsement of paper payable to bearer. Prior to the Bills of Exchange Act an instrument payable to bearer (or indorsed in blank), although afterwards indorsed specially, was still negotiable by delivery, as if the special indorsement were not upon it. Hence, even though the bill had been lost by, or stolen from, the special indorsee, any honest purchaser from the finder or thief acquired an indefeasible title to the paper. This was thought to be unjust to the special indorsee, since the buyer had notice on the face of the bill that it had become the property of the special indorsee, and ought, therefore, to make out his right through an indorsement or assignment by the special indorsee. To remedy this injustice was the object of section 8-3 of the English Act, which is reproduced in section 9-5 of the American Law.

The objection to this provision is this: If the special indorsee transfers the instrument by delivery merely, the transferee not being an indorsee, is not a holder¹ and not being a holder cannot, under section 48, strike out indorsements, and so, in order to recover against parties antecedent to the special indorser, must sue in the name of the special indorsee.

Section 40 of the American statute has no counterpart in the English Act, and, by providing that an instrument payable to bearer, although indorsed specially, "may nevertheless be further negotiated by delivery," seems to the writer to nullify the innovating section 9-5, and to leave the law as it was in England before 1882. Judge Brewster seeks to avoid this result by reading section 40 as if it contained, after the word 'negotiated,' the words "by the special indorsee," thus restricting the further negotiation by delivery to a delivery by him. The suggested explanation is, to the writer, far from convincing. He cannot escape the conviction that it is an afterthought. Had the framers of the Act fully realized that section 9-5 was an innovation, and that the language of section 40 was almost identical with that used by judges and text-writers to define the superseded doctrine,² one

384, such a note was properly interpreted as a note payable to the legal representative of A. Mr. Chalmers, who drew the English Act, says that a note payable to a deceased person is payable, since the Act, as it was before it, to his personal representative. Chalmers, Bills of Exch. (5th ed.) 23, 24. ¹ N. I. L. sec. 191.

² "Continues to be assignable by mere delivery." Chitty, Bills (11th ed.), 173. "Is transferable by mere delivery." Story, Prom. Notes (7th ed.), § 139. "Is afterwards negotiable by mere delivery." 4 Am. & Eng. Encycl. (2d ed.) 252. "Remains transferable by delivery." 2 Rand. Neg. Pap. § 705. "The negotiability is not restrained." Chalmers, Dig. (1878) 96.

must believe that, either they would have followed the English Act, and omitted section 40, or else have abandoned the language of the discarded rule along with the rule itself. Furthermore, to interpolate the additional words is to take an unwarrantable liberty with the statute.

SECTION 22. Indorsement by an infant. The learned Chairman informs us that this section is the same in effect as the corresponding section of the English Act. Other members of his committee assured the writer that the purpose of this section was to give the infant's indorsee an indefeasible title to the instrument. This is not the effect of the English Act. If the framers of this section are not agreed as to its scope, its reference back to the committee for revision would seem to be in order.

In SECTION 29 an accommodation party is defined as one who signs "without receiving value therefor, and for the purpose of lending his name to some other person." This definition was criticised by the writer as excluding the case where the signer receives a commission for lending his name, and the omission of the words "without receiving value for and" was recommended. Judge Brewster shows that the language in this section is the current definition of the books. But this does not meet the criticism. It may indicate only that he and his colleagues erred in good company. To take a concrete case. A offers B \$10 if he, B, will sign a note of \$1000 for A's accommodation. B accepts the \$10 and signs the note. Can any one seriously doubt that B is an accommodation party? If he is, the definition in this section is erroneous.

SECTION 34. The definition of indorsement. A note, a bill, and an acceptance are carefully defined in the Negotiable Instruments Law. To the writer's criticism upon the absence of a definition of an indorsement which would remove the conflict of decisions in cases where the payee writes: "I assign this note to B," or "I guarantee the payment of this note to B," Judge Brewster replies that "the liability of a party on a peculiar indorsement which is outside of negotiability must be settled by a court." But the very point in controversy is one of negotiability, as it was in the case of notes containing a promise to pay attorney's fees. It is unfortunate that an excellent opportunity to unify the law was neglected.¹

¹ In ten states a payee who transfers a note by writing on the back, "I assign this note to X," assumes the liability of an ordinary indorser. In six states such an

SECTION 37. Restrictive indorsement. A, the holder of a note payable to his order, sells it to B and is about to indorse it to him, but, at B's request, indorses it to X in trust for B, instead of to B directly. At the maturity of the note the maker is insolvent, but A is solvent. By this section, X, the indorsee, may sue any one that his indorser can sue. In other words, he may sue the insolvent maker, but he cannot sue the solvent indorser, A. Judge Brewster sees no injustice to B in the inability of X, his trustee, to sue A, upon the latter's indorsement. Let us hope that the learned judge may never find himself in B's situation.

SECTION 64. Anomalous indorser. Judge Brewster seems to have misapprehended the writer's criticism upon this section. If A makes a note payable to X or order, gets B to indorse it and delivers it to X in exchange for goods, B is liable, under this section, to X and all subsequent parties. If, however, A accepts a bill drawn by X, payable to the order of X, gets B to indorse it, and delivers it, as before, to X for goods purchased, B, under this section, is not liable to X, but only to subsequent holders. And yet the business relations of A, B, and X are obviously identical in the two cases. In each X sells to A on credit, trusting to the responsibility of both A, the buyer, and B, the surety. The amendment suggested by the writer¹ secures to X the just protection which this section in its present form denies him.

SECTION 65-4 makes the novel distinction that, while a transferor by delivery is liable on his warranty of genuineness only to his immediate transferee, an indorser without recourse, because his name is on the instrument, is liable to all subsequent holders. This distinction was criticised on the ground that the warranty in both cases was extrinsic to the instrument, being merely the warranty of a vendor, and therefore running to the vendee only. The learned Chairman makes merry with the critic by quoting a statement from the Summary of Ames's Cases on Bills and Notes² as the first printed expression of the idea that an indorser without

assignor is not an indorser. In thirteen states the assignee, like an indorsee, acquires title free from equities good against the assignor. In two states the assignee takes subject to such equities.

In three states a payee who transfers a note by writing on the back, "I guarantee the payment of this note to X," is liable as an indorser. In ten states he is not so liable. In thirteen states the transferee, like an indorsee, acquires a title free from equities good against the transferor. In three states and in the Supreme Court of the United States, the transferee takes subject to such equities.

¹ 14 Harvard Law Review 250. *Supra*, p. 50.

² 840, 882.

recourse is responsible as a warrantor to the indorsee and subsequent holders. The writer frankly confesses that a youthful indiscretion, committed so long ago that it had passed from his memory, made him fair game for the alert sportsman. But, after all, he is not so black as he is painted. In his callow days he never entertained the heresy that the indorser without recourse was liable on the instrument, or that there was any difference between his obligation and that of a transferor by delivery. The liability of each is described in the Summary in the same forms and as extrinsic to the instrument. Nor did he consider that the obligation of either was negotiable. He regarded the warranty as an assignable chose in action, with this peculiarity, that it passed, with the bill or note as an incident, without any express assignment.¹ The writer is indebted to Judge Brewster for recalling to his mind this forgotten conception, for it suggests an additional objection to this subsection. The distinction introduced between the transferor by delivery and the indorser without recourse must rest upon the fact that the name of the latter is upon the paper, and upon the assumption that such an indorsement is like a regular indorsement, except that the liability is limited to a warranty of genuineness and the like, and, therefore, runs in favor of all subsequent holders.² In other words, the indorsement is negotiable, and not merely assignable. A concrete case illustrates the difference. The holder of a bill containing several prior indorsements is induced by fraud to transfer it by an indorsement without recourse. The fraudulent indorsee transfers it to a holder in due course. The signature of one of the prior indorsers turns out to be a forgery. If the warranty of the defrauded indorser is merely an extrinsic, assignable chose in action, the holder in due course, having only the rights of the fraudulent indorsee, cannot charge him; if, on the other hand, as this section of the Act must mean, his obligation is a qualified negotiable indorsement, he is chargeable by the holder in due course. This result will hardly commend itself to any one.

SECTION 70. Presentment for payment. To the unqualified statement in this section that "presentment for payment is not

¹ He agrees now with Dillon, J., that an express assignment is necessary. *Watson v. Chesire*, 18 Iowa, 202.

² Similarly, in section 66, the two liabilities of the regular indorser — the warranty of genuineness and the engagement to pay upon due notice of dishonor — are grouped together, and made to run in favor of all subsequent holders, as if both arose upon the instrument itself.

necessary to charge the person primarily liable" the writer objected that an exception should be made in the case of bank notes and certificates of deposit. This objection seems to the learned Chairman unpractical. An objection which gives effect to the express intention of the parties and has the support, as to certificates of deposit, of the decisions in at least nine states, would seem to be sufficiently practical.

SECTION 119-4. It is said in defence of this subsection that it relates only to acts between the parties, and that the holder's acceptance of a note in satisfaction of a note, if before maturity, does not discharge the maker as against a holder in due course. This is very sound law, but, with all deference, this subsection declares just the opposite. The language is that by such an accord and satisfaction "a negotiable instrument is discharged." If it is discharged the maker can never be charged upon it. In all the other subsections of this section the discharge is complete and final.

SECTION 120. Judge Brewster says that "discharge of a prior party" in subsection 3 means a discharge "by the holder." To add the words "by the holder" seems to the writer as unjustifiable as the unsuccessful attempt that was made in Vagliano's case¹ to add to the section of the English Act relating to fictitious payees the words "to the knowledge of the acceptor." Furthermore, if the words were added, to what possible case would this paragraph apply which is not covered by the other paragraphs of this section? Finally, if the words are added, this subsection would still be indefensible, for it certainly discharges the accommodated indorser of a note, if the holder, with knowledge of the accommodation, should release the accommodating maker. This would be a shocking result and contrary to all the reported decisions on this point. This same illustration demonstrates the inaccuracy of paragraphs 5 and 6 of this section.

SECTION 186 provides that the holder's failure to present a check discharges the drawer only to the extent of loss caused by the delay. To the writer's criticism that, under section 89, the failure to give the usual prompt notice of dishonor of a check discharges the drawer irrespective of any loss to him, and that this is unjust, the learned Chairman replies, that no harm is done, for the holder may sue upon his original claim. But in all other cases

¹ 1891, App. Cas. 144.

a creditor who, by his laches, discharges his debtor from liability on a bill given in conditional payment of a debt, forfeits also all right to the debt. Furthermore, suppose a check to be given in absolute payment of the drawer's debt, or in consideration of the payee's release of a claim against a third person. Surely, in either of these cases, the holder, who loses his right on the check, has lost everything.

The writer's criticisms upon the new code may be summed up as follows:—

Section 3-2 is either useless or provocative of litigation. Section 36-2 might well be merged with section 36-3. Section 137 crystallizes an unscientific conception without any compensating advantage.

Section 29 is an erroneous definition. Section 34 is an inadequate definition. Sections 9-5 and 40 are repugnant. Section 68 introduces an unprecedented and arbitrary distinction. Section 70 would settle a conflict of decisions against the majority opinion, which is that of the chief commercial states. Section 175 copies the blunder of the English Act which codified an over-ruled decision.

Sections 9-3, 20, 37, 49, 64, 65-4, 66, 119-4, 120-3, 120-5, 120-6, and 186, taken with section 89, establish rules opposed alike to justice and to well-established law. Their enactment must inevitably be followed, sooner or later, by additional legislation to remedy the evils they would introduce.

The writer desires to repeat his opinion that the general adoption of the new code, properly amended, would be greatly to the advantage of the mercantile community. But unless the statements in the preceding two paragraphs can be disproved, the passage of the Act in its present form in a single additional state should be an impossibility.

JAMES BARR AMES.

THE NEGOTIABLE INSTRUMENTS LAW.¹
A REJOINDER TO DEAN AMES.

BY LYMAN DENISON BREWSTER.

"THE best test of a good shield," says the proverb, "is a sharp lance." No keener weapon than that wielded by the accomplished Dean of the Harvard Law School could be turned against the Negotiable Instruments Law. The fact that in his two elaborate attacks on that code he has failed to disclose a single serious flaw is the most conclusive proof of its invulnerability. A word of recapitulation and introduction may be allowed before making a direct reply to his "One Word More" in the February number of the Harvard Law Review.

Of the twenty-three subsections of the law to which the critic objects, eleven are taken from the English Bills of Exchange Act,² one follows the German code,³ one is taken from a New York statute,⁴ three are mere matters of form,⁵ and the objections to the remaining seven chiefly come, it would seem, from misinterpretations of the meaning of the law on the part of the critic.

The eleven subsections taken, most of them word for word, from the English Bills of Exchange Act, and all so identical therewith that the critic's objections apply to the acts equally, need no justification at this late date. They have been the satisfactory law of England and her colonies for twenty years. On them criticism is barred by the natural statute of limitations and the universal approval of the commercial world. One might as well criticise the Bill of Rights or the Lord Chancellor's wig. No text-book that I know of holds any doctrine contrary to the law of these eleven sections. Nor in fact has the Dean suggested any text-book which is in favor of any one of his twenty-three strictures. As to the practical working for twenty years of these eleven subsections, I beg to refer to the testimony of one of the committee who helped to draft the English Act.

¹ Reprinted from 15 Harvard Law Review 26.

² 3-2 from 3-3 of English Act; 9-3 from 7-3, with an addition not in question; 9-5 from 8-3; 22 from 22-2; 29 from 28; 37-2 from 35-2; 49 from 31-4; 70 from 52; 175 from 65-5; 186 from 74, and 66 from 52-2.

³ Sec. 20, art. 95, German Exchange Law.

⁴ Sec. 137.

⁵ 36-2, 36-3, 37.

In December last I wrote Mr. Arthur Cohen, Q. C., who was one of the committee who framed the English Act, stating the sections of the English Act which Dean Ames had criticised in his first article, and asked him if those sections had caused any difficulty in English practice. Unfortunately the copy of the American Act which I sent to him did not reach him, and he could only answer partially the points suggested. I wrote again, sending the two articles of the Dean, the answer, and the American Act, expecting to be able to publish his reply in this article. As it has failed to reach me at this writing,¹ I can only give the substance of the letter received from him dated January 30, 1901. It was evidently not intended for publication as a whole, but I am permitted to make the following quotations:—

“No difficulties have arisen in England with reference to the suggested points, nor any litigation except as to the meaning of ‘fictitious person.’ The question came before the House of Lords in *Vagliano v. Bank of England*, 1891, Appeal Cases, 107.

“I think you are to be congratulated if your Act has not been and cannot be objected to for more formidable reasons.”

In a letter received several years ago Mr. Cohen had written as follows:—

“In my opinion the language of your bill is singularly felicitous. It is more clear, concise, less stiff and artificial than our Bills of Exchange Act, and in this respect—one by no means unimportant—your draft is an improvement on our Act.”

Perhaps it ought to be added here that Judge Chalmers, the draftsman of the English Act, to whom a draft of the Negotiable Instruments Act was sent in 1896, after congratulating Mr. Crawford on the success of his work, recommended Mr. Cohen as one of the three best authorities in England on the law of bills and notes, the other two, I believe, being eminent London bankers, who had participated in the drafting of the English Act.

One word as to those eight sections which the Dean does not think it necessary to re-argue. As my answer to the criticisms on those eight sections, founded chiefly on their utility and convenience, does not seem convincing to the critic, I pause, deprecatingly, to suggest that the same eight sections are also well sustained by authority, as well as by reasons of convenience.

¹ For letter received after sending to press, see Appendix, *infra*, p. 92.

Let us see. Section 20, it is claimed, makes by implication an unauthorized agent liable personally on the note. In addition to the answer already given in the Yale Law Journal for January, 1901, *i.e.* "that the agent alone is in law, as in fact, the real maker of the note" in such cases, and might well be made directly liable, as he always is ultimately, it is proper to refer to the fact that the rule which the Dean claims is laid down in the Negotiable Instruments Law is adopted in the German Code, to which the Dean refers us as a model,¹ and is declared in *Byars v. Doores*,² as having "the weight of authority" decidedly in its favor at that time. Tiedeman (sec. 84) cites eleven cases so holding, to which we may add 147 Ill. 520; 104 Ind. 32. There are more cases one way and more states the other.

The Dean's criticism on sections 37-2-3 was that the word "trustee" was more descriptive of the position of the indorsee in restrictive indorsement than the word "agent," and so but one word should be used. It is proper to say that the text-writers take exactly the opposite view,³ and so did Dean Ames when he published his *Leading Cases*. In his *Index and Summary*, p. 837, is the following section:—

"The term 'restrictive indorsement' is commonly but loosely applied to *two distinct kinds of orders*,⁴ namely, to an order, whereby the holder indorses a bill to one person in trust for another, *e.g.* 'Pay A for account of B'; 'Pay A for the use of B'; and to an order whereby the holder simply deposes to an agent the business of collecting a bill, *e.g.* 'Pay to A for my use.'" It was with reference to this "common," *i.e.* ordinary use of the word that the section in question was framed.

Mr. Tiffany, in the new Norton Hornbook on Bills and Notes, as usual hits the exact distinction tersely and clearly (p. 124):—

"The first and commonest variety, and the one which is generally spoken of by the text-writers as the restrictive indorsement, is that where the holder deposes to some other person the business of collecting the bill; the other where the holder indorses the instrument to one person for the use or benefit of, or as the trustee of another."

Regarding section 49, which treats of the right to have the transferrer indorse, which follows the English Act and does not

¹ American Law Register, March, 1900, vol. 39, p. 145.

² 20 Mo. 284.

³ See especially Chalmers, 5th ed.; McLaren on Canadian Bills of Exchange Act, 214; Tiffany's Norton, 124.

⁴ The italics are ours.

follow the Colorado Act, as the critic would have it do, it may be pertinent to say that the annotator of the Colorado Act, Mr. J. Warner Mills (p. 23), says, speaking of the two forms of expression, "but either form of expression establishes the equitable rule of law."¹

Section 66 is substantially in the line of section 55 of the English Act, as already suggested.

Section 68, making joint indorsers liable severally, which the critic called "a blunder," and now calls "unprecedented" and "arbitrary," is in accord with the theory of the law already established in most of the states which adopt the reformed procedure, say three quarters of the states of the Union.² "The liability of each indorser is several. So now by statute generally."³

Section 137, making destruction of a bill acceptance, at first was objected to as "a perversion of language," "fantastic and inexplicable."⁴ It is now described as "crystallizing an unscientific conception." Whether it is fantastic, or crystalline, or scientific, is not, perhaps, so very material. But instead of its being "a conception" of the draftsman or of the conference, the section was taken from the statutes of eight states, including the state of New York, from all of which the report was that "it had worked well." The bankers regarded it as a simple, practical, definite working rule, and none of the twelve commentators on the Negotiable Instruments Act have suggested the least objection to it.

Section 175. Payment for Honor. The Dean argued in the December number of the Review that because Mr. Chalmers adopted in the English Bills of Exchange Act the doctrine of an overruled case,⁵ the fact of its having been overruled must have been overlooked. By reference to note 3, page 237, of the fifth edition of Chalmers, he will see that the overruling case⁶ is duly cited as well as the continental codes. There was no "slip of memory" there. Daniel favors the overruled case.⁷

¹ See, also, Huffcutt, 26, to the same effect.

² Connecticut Rules of Practice, p. 1, sec. 2; 2 Bliss, 53; Pomeroy, 2d ed., 326.

³ Norton, 159.

⁴ See our answer to these adjectives and others, 10 Yale Law Journal, 88, January, 1901.

⁵ *Ex parte Lambert*, decided by Lord Erskine.

⁶ *Ex parte Swan*.

⁷ Daniel, sec. 1255; Norton, 301.

DIRECT ANSWER TO "ONE WORD MORE" IN THE FEBRUARY
NUMBER.¹

Section 3-2. This section asserts the familiar doctrine that an order or promise is not rendered conditional by "a statement of the transaction which gives rise to the instrument."² The Dean's first article declared this clause "unmeaning, deplorable, nullifying several decisions," and either "mischievous" or "obscure, inartistic, and useless." He cited, to show the inefficiency of the Negotiable Instruments Act on this point, the case of *Third Bank v. Spring*,³ an Erie County Supreme Court case, in which he said "the judge ruled that the Negotiable Instruments Law had no application to such a note." In the answer it was stated that that case was reversed in the Appellate Division.⁴ The Dean now replies that the reversal did not affect the point he made that the Negotiable Instruments Act was not applicable. On reexamination it turns out that the note in question in that case was made in 1896 and negotiated in May, 1897. Whereas the New York Negotiable Instruments Law did not go into effect until October, 1897, and therefore, as the judge said, had no application to it. The law had not then become operative in the state of New York. So much for the wee Supreme Court case of Erie County, which was supposed to demonstrate the inefficiency of the Negotiable Instruments Law as expressed in section 3-2. As this is the only case decided on the Negotiable Instruments Law cited by the Dean, and that did not come under the law at all, the natural inference is that the Dean labors under some difficulty in treating the subject under the "case law system." He is likely to continue to so labor, for the Negotiable Instruments Law, not only in England, but in this country, diminishes litigation and the necessity for it to an astonishing degree.

Next page, in note 3, the Dean speaks of "Judge Brewster's startling suggestion that a note payable to the order of unincorporated associations or the estates of deceased persons is payable to bearer by force of this section 9-3." But in point of fact, by referring to the answer published in the Yale Law Journal, on the criticism on section 9-3, it will be seen that, instead of being put down as a statement of the writer in the Law Journal, it is put down as follows:—

¹ Harvard Law Rev. 442.

² English Act, 3-3; 4th Am. & Eng. Enc. of Law, 89, citing 43 cases.

³ 28 N. Y. Misc. 9.

⁴ 50 App. Div. 66.

"His [the Dean's] criticism seems to imply that the act should cover rare and imaginary exceptions rather than serve the commendable purpose which he concedes that the section has, of providing for common cases, such as notes payable to unincorporated associations, estates of deceased persons, and the like."

If the concession is denied, that is a question of fact. If it is admitted, is it quite right to exploit one's own admission as the opinion of his opponent? As to the section criticised, it is not only more conservative than the English act, but it is so laid down in the text-books.¹ As to the doctrine of the illustration itself, to wit, that the estate of one deceased is regarded as a fictitious payee, the only point about that was that it was convenient in such cases to use a fictitious name.

"How far afield a figure sometimes leads."

Is section 40 inconsistent with subsection 9-5?

Sub-section 9-5 reads as follows:—

"The instrument is payable to bearer when the only or last indorsement is an indorsement in blank."

Section 34 is:—

"A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery."

Section 40 is:—

"Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

How, giving the language of section 34 its legitimate effect, there is any repugnancy between subsection 9-5 and section 40, I have never been able to perceive. Without rediscussing whether the critic was justified in changing the language of section 40, in the first article, or whether the substantive "negotiation" in section 34 applies to the verb "negotiated" in section 40, I much prefer to refer the reader to the full and clear exposition of the

¹ Daniel, 119; Randolph, 169; Tiedeman, sec. 243.

whole matter in the new Norton Hornbook, pages 110 to 118. Mr. Tiffany's paraphrase of section 40 on page 116 assumes that the words "indorsed in blank" are equivalent to the words "payable to bearer," and is as follows:—

"An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards specially indorsed, is still payable to bearer; except as to the special indorser, who on such an instrument, after such an indorsement, is only liable on his indorsement to such parties as make title through it."

But what is the result of this interpretation? In the new Norton Hornbook, not only do 9-5 and 40 stand as good law, but after going over all the cases on pages 116-17-18, and after stating that the application of the rules "is somewhat confusing to the student," Mr. Tiffany sums up as follows:—

"The rule is well settled that if a note or bill be once indorsed in blank and afterwards indorsed in full, it will still, as against the drawer, payee, and prior indorsers, be payable to bearer, though, as against the special indorser himself, title must be made through his indorsee."

In other words, Mr. Tiffany finds no inconsistency at all. Subsection 9-5 and section 40 stand in perfect harmony. In fact, one is the complement of the other.

As to section 22, the Dean's claim is that some members of the committee informed him that they interpreted the section differently from the interpretation given in the Yale Law Journal. I can only say that I never heard of any other interpretation, nor was any such intimated when the committee reported to the conference that they found none of the Dean's criticisms tenable.¹

Section 29. Accommodation Paper. One hardly knows what language to use in characterizing the serene self-confidence with which the Dean reiterates his conviction that everybody is wrong in defining accommodation paper as paper without consideration. Having shown in the answer that not only all the cases, all the text-writers, and all the encyclopedias, the law dictionaries, and the ordinary English lexicons, are against him, and all give the same definition as the Negotiable Instruments Act, his only reply is that "the conference erred in good company." It is the Dean against the world. Therefore so much the worse for the world. This eccentric heresy of the Professor makes his illustrations

¹ For the fair interpretation of section 22 see the new edition of Norton's Hornbook, 220, and note 15 therewith.

referring to accommodation parties utterly meaningless. The contestants are not using the same yardstick.

The original criticism on section 34 was "that it nowhere stated that an indorsement is an order, and nowhere defined the difference between a guaranty and an indorsement." Our answer was that it was for the court rather than for a code on negotiability to settle questions outside of negotiable instruments. The new criticism is that "it is unfortunate that an excellent opportunity to unify the law was neglected." Yet in his first note the Professor prides himself on the fact that the adoption of his proposed amendments would shorten the act by something more than a dozen lines. One ventures to say that if this "excellent opportunity to unify the law" by laying down the law of assignments and guaranty were embraced, and the omissions which the Dean recommends at the end of his first article were also added, the Negotiable Instruments Law would have contained fifty instead of thirty-six pages.

Section 37 is an exact copy of the English Act. The fact that no trouble has arisen under it in England sufficiently indicates that the immunity the Dean claims for the solvent indorser "A" does not exist. Equity would take care of that.

Section 64. Anomalous Indorsers. One must answer the algebraic illustration of the supposed misapprehension of the present writer on the Dean's first criticism by giving a Roland for an Oliver. For the lamentable fact is that the Dean seems to have misapprehended the answer already given and the reasons stated why his first proposed substitute would defeat the purpose of the act. In the careful examination of this section by Mr. Tiffany,¹ the editor says, after referring to the previous "chaos of conflicting authorities," and speaking of the rule laid down in the Negotiable Instruments Law, as "an important step toward uniformity on this subject," "that it has the further advantage that it abolishes so-called 'presumptions,' lays down definite rules of liability; and that it probably gives expression as nearly as possible to the actual intentions of the parties in such cases." As the Dean's definition of accommodation paper includes paper for value received, his new illustration has no meaning, if the illustration makes "B" an accommodation indorser.

65-4. The Dean claims the doctrine quoted in the answer

¹ Norton's Hornbook, pages 138-143.

from his *Leading Cases*, that an indorsee without recourse is liable to subsequent holders on his warranty of genuineness, was "a youthful indiscretion" committed in his "callow days," and adds that neither now nor then did he ever entertain the heresy that there was any difference between the obligation of a qualified indorser and that of a transferor by delivery. In addition to former quotations from Daniel and Norton on this subject we beg to refer him to the following quotation from the very able article on Bills and Notes in the 4th American and English Encyclopedia of Law, 2d edition, page 281:—

"Indorsement considered as a transfer of title. (1) Generally. The liabilities of an indorser as a vendor or transferor of the instrument are identical with those of a transferor by delivery, with this exception, that while a transferor by delivery is liable only to his immediate transferee, an indorser, being a party to the instrument, is liable to all subsequent bona-fide holders."¹

As both this article and the code were published simultaneously, neither could have borrowed from the other. The critic has no need to blush for a "youthful indiscretion" adopted by four of the best American authorities.²

Sections 70 and 119-4 add nothing to what have already been discussed. Reiteration does not advance the argument.

Section 120-3 declares that a person secondarily liable on the instrument is discharged by the discharge of a prior party. The critic's arbitrary reply to the answer in regard to this section almost eclipses his remarks on section 29. It had been said in answer to the Dean's strictures on section 120-3 that the context clearly showed that his rendering was a misinterpretation of

¹ To the same effect is Tiedeman, section 244, note 5; Norton, 167.

² It may be pardonable to repeat here a note on this section from our answer in the Yale Law Journal, January number, page 93, although that note is perhaps more pertinent to some other sections in which the Norton Hornbook is freely quoted:—

"On this point I have cited chiefly the new Norton Hornbook, on Bills and Notes, just edited by Mr. Francis B. Tiffany, not only because it is one of the ablest and most interesting discussions on this special point, but because the editor seems to have taken most of the new matter in the book equally from the Negotiable Instruments Law and Professor Ames's *Leading Cases on Bills and Notes*. The preface says: 'The present editor wishes to express his great obligation to Professor Ames, whose Index and Summary at the end of the cases, unquestionably the most important contribution to the subject that has been made in America, he has constantly consulted.' It is, hence, doubly reassuring to note that with so orthodox an authority for 'constant' reference, as the *Leading Cases on Bills and Notes*, Mr. Tiffany quotes a score of definitions, bodily, from the Negotiable Instruments Law, and so far as I have observed does not seem to disagree with its statement of law on any point."

the meaning of that section, that none of the learned authors who have discussed the Negotiable Instruments Act since it was enacted interpreted it as he did, that the commissioners from thirty-two states whose special duty it was, in reporting the Negotiable Instruments Law for adoption, to mention every change, never suggested any change from the existing law in that section, that it was the language generally given in the text-books,¹ and that the ordinary rule of construction of codes reaffirming the common law was never to assume any change unless imperatively demanded by the language used. The only reply to all these points made in the answer is that the Dean entertains a different opinion. Why he should do so he does not inform us, except by reference to the Vagliano case.

To be sure the Vagliano case refused to add the words "to the knowledge of the acceptor" to the section of the English Act relating to fictitious payees; but why? Because, as the court says in the case of *Shipman et al. v. Bank of the State of New York*,² it is apparent the code "intended to make the change and did make the change," but with such extreme reluctance and dissent as to strengthen rather than weaken the doctrine we had cited in Sutherland and Endlich, that in codes restating the common law, "no change is presumed except by the clearest and most imperative implication." In point of fact the Dean practically seeks to read into this subsection (120-3) the words "by operation of law."

The Dean further claims this paragraph, when interpreted as everybody else interprets it, as meaning "a discharge by the holder," could apply to "no possible case." Then what "possible" harm could it do, except in releasing that extraordinary accommodation indorser, always in reserve, who haply indorsed it "for value received"?

Section 186. But the most truly academical criticism in the whole list is the objection to section 186. The section reads thus:—

"A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Copied from the English Act, repeated in the text-books since the first edition of Byles on Bills, with no reported case to the

¹ Norton, 260 and 308.

² 126 N. Y. 318, 335.

contrary, this section, at least, would seem to be solid. But, no! In section 89, treating of notice of dishonor generally, the Dean detects a hidden danger, and insists that under the combined operation of the two sections, the drawer of a check would escape liability if no notice of dishonor were given. To be sure, section 89 also is in the English Act and in all the text-books, but what of that? Section 186, the critic says, taken with section 89, establishes a rule "opposed alike to justice and to well established law." How or why the joint effect of the same two statements of law should be one thing at the common law or the law merchant and totally and mischievously different when put in a code, does not appear. If what the Dean means is that section 186 is orthodox enough, but that section 89 is not sufficiently guarded by its own expression and by sections 70, 114, 185, and other kindred sections (as I believe it is), that raises another very different question not heretofore discussed. Although both the English and American acts define checks to be bills of exchange for the sake of convenience, in point of fact this is not strictly true.¹ And the courts, doubtless, in construing the Negotiable Instruments Act, would recognize the distinction between the two, and construe section 89 accordingly, with reference to the ordinary law on demand paper and checks, and practically hold the drawer primarily liable, as he is, in fact, the principal debtor. But however that may be, instead of section 186 aiding the supposed unjust effect of section 89, in discharging the drawer of a check if notice of non-payment is not given, its effect is exactly contrary to that.

For, since the only penalty for delay in presentment (186) is the loss occasioned by delay, and *not* a discharge, the natural inference therefrom would be that the same exceptional exemption as to checks would continue in case of non-payment, namely, that the only penalty would be the loss occasioned by the delay, and *not* any absolute discharge, as claimed by the Dean. It is sufficient here to add, in regard to both sections 186 and 89, that they have been fairly tried and worked well together.

Considering the enormous business in checks every day, the fact that in twenty years' experience in England and four years in four states in the Union, no impecunious drawer of checks

¹ See 5th Am. & Eng. Enc. of Law, page 1030 and note 2; Norton, page 408, sec. 151.

has ever been crafty enough to claim a discharge of his obligation in this ingenious way would seem of itself to refute the strained construction of the Dean. But if a right of action was lost on the check by the effect of the combined sections, the drawer would be liable on the original debt.¹

APPENDIX.

*Letter of Mr. Arthur Cohen, Q. C., on the Negotiable Instruments Law.*²

5 PAPER BUILDINGS, TEMPLE, LONDON,
March 11, 1901.

DEAR SIR, — The following are some observations which occur to me in reference to some of Professor Ames's very ingenious and able criticisms of the Negotiable Instruments Act in the "Harvard Law Review."

First, Section 3 provides that an order or a promise is not rendered conditional by the addition of a statement of the transaction which gives rise to the instrument. These words were inserted in the English Act in order to provide for cases where the bill or note contains an order or a promise to pay a certain sum "being a portion of a value or order (*sic*) deposited in security for the payment hereof," or "on account of money advanced for a certain person," and similar cases in which the transaction on account of which the bill or note is given is referred to. Such cases presented themselves in 7 T. R. 733, L. R. 3 Q. B. 753, and other reported decisions. The words in the English Act correctly state what the English law is, and I see nothing obscure, inartistic, or useless in them, nor do I think that any intelligent judge could be misled by them.

As regards section 36-2-3, I do not think that the words used could possibly mislead or present the slightest difficulty to any intelligent person, and as it is by no means easy to determine in what cases an agent is or is not a trustee in the proper sense of the word, I am of opinion that the section ought not to be altered.

Section 9-3 declares "an instrument to be payable to bearer when it is payable to the order of a fictitious or non-existing person, *and such fact was known to the person making it so payable."* The section is substantially the same as the corresponding one in the

¹ 2 Randolph, 1554; 2 Daniel, sec. 1120; Van Schaack on Checks, 164, who says "the holder is agent of the drawer," and on page 25 "the drawer is the principal debtor"; Tiffany's Norton, 418, which cites on this point, among many other cases, *Bull v. Bank*, 123 U. S. 105.

² This letter was received after the above article went to press.

English Act with the exception of the words between asterisks. In *Vagliano v. Bank of England*, 23 Q. B. D. 260, Lord Justice Bowen says:—

“The exception that bills drawn to the order of a fictitious or non-existing person might be treated as payable to bearer was based upon the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character or non-existence of the supposed payee.”

The English Act has modified and simplified the law, but the Negotiable Instruments Act has not gone so far as the English Act. I do not think that the section in question will work any injustice, or that there is any sufficient ground for altering it.

Section 9-5. This section is substantially the same as 3 of the English Act. We altered the English law as it stood before the passage of the act. This was deliberately done on the strong recommendation of the bankers and merchants who were members of the committee, and I have reason to believe that the alteration of the law has been generally approved of in the United Kingdom, and there does not seem to have been any opposition to it manifested in the United States.

Section 20. This section certainly alters the law as it exists in England, but I think it very likely that the alteration is an improvement. The wisdom of the rule laid down in *Cohen v. Wright* has often been doubted. Professor Ames takes one case, that of the supposed principal being a bankrupt. Even in that case it would be doubtful what could be recovered until the dividend was declared and the bankruptcy concluded; and in the case of the principal not being bankrupt, but being a man in bad credit, the question would have to be left to a jury what amount could properly be recovered from the principal. It may well be held that in actions on negotiable instruments, against a person who professedly acts on behalf of another person, A, it would be inconvenient to allow the former to allege an attempt to prove that probably the whole amount could not be recovered from A. I think the 20th section should be retained, and may be considered as a practical improvement of the law, unless there be reason to suppose that merchants and bankers think it unjust. I agree with Mr. Brewster that much indulgence should not be shown in business to a person who professes to have authority when he is really acting without authority.

As regards section 22, it expresses what Mr. Justice Mellor stated as reported in the 8th of *Best & Smith*, page 833. I think the section objected to is equivalent to the corresponding section of the English Act. The infant cannot be sued, but he can transfer the instrument so as to enable a holder to sue other persons. Professor Ames seems to think it unjust that persons should be able to *retain the negotiable instrument* against the infant. I do not see the injustice of this if the infant himself cannot be sued on the instru-

ment. Again, I do not think any intelligent judge could be misled by the wording of this section.

Section 29. This is the same as the 28th section of the English Act, which has given rise to no doubt or difficulty. "Without receiving any value therefor" means without receiving any value for the bill, and not *without receiving any consideration for lending his name*.

Section 68. This section does alter the law, at any rate as it exists in this country. To me it seems very doubtful whether it is not an improvement by reason of its sweeping away certain technicalities. There has always been a tendency in the law merchant to consider contracts which are in form joint contracts as being intended to be joint and several.

Section 137. I am of opinion with Professor Ames that this section is imperfect. It would seem to imply that if the bill be destroyed or not returned accepted within a reasonable time, notice of dishonor need not be given to the drawer. This is not in my opinion the law, and ought not to be law.

I do not think the act is imperfect because it does not contain rules relating to the conflict of laws, any more than it could be considered imperfect because it does not contain rules defining illegality or fraud. The sections in the English Act relating to the conflict of laws were introduced in order to embody the result of certain recent English decisions. I do not know whether the American decisions relating to these questions are sufficiently uniform to render it desirable to embody these results in a code relating to negotiable instruments.

On the whole, I consider the Negotiable Instruments Act a very important and ably framed code. Its style and language seem to me in some respects better than those of the English Act, as being simpler, less technical, and more easily intelligible. I have no doubt it is not perfect. What code is perfect? Whether the very few blemishes which may have been discovered are such as ought to induce states which have not yet adopted the act to require it to be amended, in a few respects, is a question of expediency and public or state policy on which I do not venture to express an opinion.

I am very sorry I have not had time to write more or to put my observations into a better shape.

We are, you may be interested to know, engaged in codifying the law of insurance, and I think the bill will be found to be a useful measure.

Believe me, yours very sincerely,

ARTHUR COHEN.

SUPPLEMENTARY NOTE.

BY JAMES BARR AMES.

Two recent decisions suggest the need of amending two sections of the Negotiable Instruments Law, not considered in the preceding articles reprinted from the "Harvard Law Review."

In *Tolman v. American Bank*,¹ one Louis Potter, representing himself to be Ernest Haskell, induced Tolman to give him his check upon the American Bank, payable to Haskell. Potter indorsed this check in Haskell's name, and the indorsee collected it from the drawee bank. The bank, it was decided by the Supreme Court of Rhode Island, could not debit Tolman, the drawer, with this payment, but must bear the loss due to Potter's fraudulent impersonation.

The Court based this decision upon common law principles and also upon Section 23 of the new Code. The decision is a surprising one in either aspect. Not one of the common law cases cited in its support is in point. On the other hand, all the reported cases on the point of fraudulent impersonation are against the decision.² As a statutory question, but for this decision, the liability of the drawer would seem clear under the last clause of the section. He expected that the physical person before him, to whom he delivered the check, would indorse it, as he did. Is he not, therefore, by his conduct, "precluded from setting up forgery or want of authority"? But the opinion was delivered by the learned Chief Justice Stiness, one of the most influential of the Commissioners who framed the Negotiable Instruments Law. It is difficult to believe that the courts which decided the cases opposed to *Tolman v. American Bank* will agree with the view of the Rhode Island Court, that those cases are nullified by Section 23 of the new Code.³ But this section, in the light of the only judicial interpretation it has received, unless amended, must be a source of mischievous uncertainty.

In *Jeffrey v. Rosenfeld*,⁴ a note secured by a mortgage was altered, but by whom did not appear. It is a long-established doctrine in

¹ 48 Atl. R. 480.

² *U. S. v. Nat. Bank*, 45 Fed. R. 163; *Meridian Bank v. First Bank*, 7 Ind. App. 322; *Meyer v. Indiana Bank* (Ind. App. 1901), 61 N. E. Rep. 596; *Maloney v. Clark*, 6 Kan. 82; *Emporia Bank v. Shotwell*, 35 Kan. 360; *Robertson v. Coleman*, 141 Mass. 231; *First Bank v. American Bank*, 49 N. Y. App. Div. 349; *Merch. Bank v. Metropolitan Bank*, 7 Daly, 137; *Elliot v. Smitherman*, 2 Dev. & B. 338; *Forbes v. Espy*, 21 Oh. St. 474; *Land Co. v. N. W. Bank*, 196 Pa. 230. See also *Hoge v. First Bank*, 18 Ind. App. 501; *Metzger v. Franklin Bank*, 119 Ind. 359.

³ If those decisions are nullified by the new Code, the similar decisions in regard to the sale of chattels (*Edmunds v. Merch. Co.*, 135 Mass. 283) remain intact. This certainly would be a singular antinomy.

⁴ 61 N. E. R. 49.

England that a material alteration of a note, though made by a stranger, avoids it. This doctrine is perpetuated in Section 64 (1) of the English Bills of Exchange Act. In this country the English rule was not followed. The holder's rights were not impaired by an alteration by a stranger. But Section 124 of the Negotiable Instruments Law relating to "alteration" is almost a verbatim copy of the English act. We are then in this dilemma,—either the English and American sections, although expressed in the same terms, must be interpreted differently, or else the American law is changed, and, as it seems to the writer, for the worse. To avoid the second horn of the dilemma involves a great straining, not to say perversion, of simple English words. The Supreme Court of Massachusetts found it possible to sustain the holder's right to foreclose his mortgage without interpreting this section of the new Code, but remarked that the question of its interpretation was one that deserved serious consideration. There seems to be no good reason why, for the sake of uniformity, a state which has not yet adopted the Negotiable Instruments Law should deliberately introduce the difficulties sure to arise from this section and Section 23.

JAMES BARR AMES.

REPLY TO SUPPLEMENTARY NOTE.

BY LYMAN DENISON BREWSTER.

TOLMAN v. American Bank. The exact point in *Tolman v. Bank* was simply this: Was it "precluding" negligence for Tolman to trust the stranger Potter with no further inquiry than that stated in the opinion? On this precise point as to a "stranger payee" there are but two exact precedents.¹ The first is *Nat'l Bank v. Nolting*.² This case holds the bank liable, saying "to hold that giving a check to a stranger . . . was sufficient . . . evidence to excuse the bank . . . would be to relieve the bank from a just responsibility." The second case is *Smith v. Mech. Bank*.³ This case by a divided court held the bank not liable.⁴ The theory of the Dean as to the drawer's expectation that the "physical person before him" would indorse the note had already been shown to be a fallacy. The real intent is that the payee named shall be the actual payee.⁵ The robust com-

¹ 5 Am. & Eng. Enc. of Law, 2d ed., 1066.

² 94 Va. 263; 26 S. E. 326.

³ 6 La. Ann. 610.

⁴ See criticism on this case, 2 Morse on Banking, 2d ed., sec. 474.

⁵ Note in 50 L. R. A., to *Land Co. v. Bank*, 83; article on "Loss by Check delivered to Impostor," Case & Comment, vol. 7, No. 7, Dec. 1900, page 75.

mon sense of Judge Stiness's opinion on this "intention" point ought to make further discussion thereon needless. And this, too, whatever question there may be as to the correctness of his conclusion in regard to the common law precedents on the general question of fraudulent impersonation. As the Louisiana and Virginia cases above cited put their decisions on the facts attending the giving the checks to a stranger, the question of negligence in such cases would seem to be considered by the courts largely a question of fact. Such being evidently the rule, one would say it was hardly within the province of a short code to provide in detail as to what particular acts of negligence should preclude the drawer from setting up "forgery" or "want of authority" as to a signature, or any negligence by which the fraud was facilitated by his own action. As both the Judge and the Dean agree that the Code does not change the true common law, whatever that may be, the Code on this matter would seem to be about right after all, and to specialize as much as the nature of the case permits.

Jeffrey v. Rosenfeld. Section 124 changes both the English and the American law in both clauses, since the second clause affects the first fundamentally. Mr. Tiffany, in his new edition of Norton,¹ says of section 124 that under the second clause "alteration has ceased to be a defense." Perhaps he should have said "practically ceased to be a defense." Why then is the old rule of the common law in England as to the note itself—not the debt—regarding alterations by a stranger as now modified by clause 2 not the best rule between the parties themselves? It makes the law of the two countries uniform on this important point, and like the Statute of Frauds preserves the benefit of written evidence. The Dean gives no reason to the contrary. Such was Mr. Crawford's view as given to the Conference in 1896 and approved by it. That is, he held with the Dean contrary to the *dictum* intimated by Judge Morton, that the American rule was so far changed by the Code. As the Dean says, to hold otherwise would indeed "be a perversion of simple English words." As this appears to be the first case so far in which any judge has suggested any ambiguity in the Code, and this in an *obiter dictum*, and Dean Ames says there is no ambiguity, the Code seems to have fared well on that score. It seems to me, therefore, the critic has shown no sufficient reasons why either section 23 or section 124 should be changed.

I beg to add in regard to the exceedingly few decisions on the Negotiable Instruments Act two cases well worthy of the attention of any student of the subject, *Wirt v. Stubblefield*² and *Andrews v. Robertson*.³ As I read them, both hold to the construction hitherto

¹ Page 248.

² 17 Appeal Cases, Dist. of Col. 283.

³ Wis. 87 N. W. 191.

insisted on in the articles previous to this. That method of interpretation of itself practically disposes of all the serious questions raised by the critic.

Nevertheless, lest the "shadow of a great name" should cause any legislature to delay the adoption of the Negotiable Instruments Law, I venture to add that since the four previous articles have appeared and after a very careful study of them the judiciary committee of the Pennsylvania legislature thought it inadvisable to change a word of the act, and the legislature passed the law without any change whatever after a very thorough discussion of all the points raised by Dean Ames, including the case of *Jeffrey v. Rosenfeld*.

The same conclusion was arrived at by the American Bankers' Association. Judge Chalmers, author of the English act, after going over the whole discussion, while highly extolling the infinite ingenuity of the critic, regarded none of his serious contentions tenable. As to its practical reception wherever adopted, Mr. Tracy, chairman of the Committee on Uniform Laws of the American Bankers' Association, says: "The Negotiable Instruments Law has worked satisfactorily to all classes of business men."

LYMAN DENISON BREWSTER.

THE NEGOTIABLE INSTRUMENTS LAW.¹

A REVIEW OF THE AMES-BREWSTER CONTROVERSY.

BY CHARLES L. MCKEEHAN.

THE Negotiable Instruments Law has now been adopted by twenty states ² as well as for the District of Columbia, and there is little doubt that in a very few years, at the longest, it will be the law throughout this country. Aside from the importance of the subject with which it deals, the act claims a peculiar interest as being the first important step taken in this country towards codifying any branch of the law. In 1878 Judge Chalmers published his digest of the law relating to bills of exchange, in the preparation of which he read through all the English cases (some twenty-five hundred in number) beginning with the first reported case in 1603. Where there was a dearth of English authority, he states that he had recourse to the American decisions and to the usages among bankers and merchants. Two years after the publication of the digest, the Institute of Bankers and the Associated Chambers of Commerce instructed him to prepare a bill on the subject. This he did, his aim being, to use his own words, "to reproduce, as exactly as possible, the existing law, whether it seemed good, bad, or indifferent in its effects." The bill was introduced into Parliament in 1881, and after a few amendments had been made by the Select Committee of merchants, bankers, and lawyers, to which it was referred by the House of Commons, and by the Select Committee headed by Lord Bramwell, to which it was referred by the House of Lords, it passed both houses without opposition. It is worth noticing that amendments were inserted only when the Committee was unanimous in their favor, no amendments being pressed on which there was a difference of opinion. Practically, the English bill was an enactment into law of Judge Chalmers' digest. For the most part the propositions of the act were taken word for word from the propositions of the digest, and excepting a few amendments which

¹ Reprinted by permission from 41 American Law Register, N. S. 437, 499, 561, with a few changes and additions subsequently made by Mr. McKeehan.

² Arizona, Connecticut, Colorado, Florida, Iowa, Maryland, Massachusetts, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, and Wisconsin.

were inserted to choose between conflicting decisions, or to correct some admittedly serious errors in the law, the whole purpose of the English Bills of Exchange Act was to reproduce, as exactly as possible, the existing law. This act has now been in force in Great Britain for twenty years, and has been adopted by all of her self-governing colonies. English merchants, bankers, and lawyers appear to unite in the opinion that it has been successful even beyond expectation.

At the Annual Conference of the Commissioners on Uniform State Laws, held in Detroit in 1895, a resolution was passed requesting the Committee on Commercial Law to procure, as soon as practicable, a draft of a bill relating to commercial paper based upon the English Bills of Exchange Act and upon such sources of information as the Committee might deem proper to consult. The matter was referred to a sub-committee consisting of Judge Lyman D. Brewster, of Connecticut; Henry C. Willcox, of New York, and Frank Bergen, of New Jersey, who secured Mr. John J. Crawford, of the New York bar, a well-known expert on the law of bills and notes, to draft the proposed bill.

The English act had followed the continental codes as to form, *i. e.* it dealt primarily with bills of exchange, and then applied those provisions, so far as they were applicable, to promissory notes, adding provisions which were peculiar to the latter class of instruments. Deeming this form to be unsuited to American conditions — the use of bills of exchange being proportionately less extensive here than in Europe — Mr. Crawford adopted a form of his own, which grouped together the provisions applicable to all kinds of negotiable instruments, and then collected, under separate articles, the provisions specially affecting the different classes.

Mr. Crawford's draft was laid before the sub-committee, each section being annotated with reference to the decisions of the Courts, the comments of text-book writers, and the statute laws of the several states. This draft (slightly amended by the sub-committee) and the draftsman's notes were printed along with the English bill for comparison, and copies were sent to each member of the Conference, to many prominent lawyers and law professors, and to several English judges and lawyers, with an invitation for suggestions and criticisms. The draft was then submitted to the Conference at Saratoga in 1896. The twenty-seven Commissioners who were in attendance — representing fourteen different states — went over it section by section, and made some amend-

ments to it, "most of which," says Mr. Crawford, "were such changes in the existing law as I had not felt at liberty to incorporate into the original draft."¹ The draft as thus amended was adopted by the Conference, and in such form has been submitted to the various state Legislatures.

The most important contribution that has been made to the act is the Ames-Brewster controversy. In the Fourteenth Harvard Law Review, Professor James Barr Ames, Dean of the Harvard Law Faculty, for some years lecturer on Bills and Notes in the Harvard Law School, and the author of the leading case book on the subject, published an article criticising some twenty-three sections of the new act, and expressing the opinion that notwithstanding the act's many merits, "its adoption by fifteen states must be regarded as a misfortune, and its enactment in additional states, without considerable amendment, should be an impossibility." Professor Ames' criticisms were answered by Judge Lyman D. Brewster, President of the National Conference on Uniform State Laws, and a member of the sub-committee which drafted the act. The discussion consists of two articles in the Harvard Law Review, by Professor Ames,² and two articles by Judge Brewster, one published in the Yale Law Journal and one in the Harvard Law Review.³ In a pamphlet recently published by the Harvard Law Review Publishing Association, containing the text of the act, together with these articles, there are added a supplementary note by Professor Ames criticising two additional sections of the act — a reply thereto by Judge Brewster, and a letter containing comments on some points of the discussion by Mr. Arthur Cohen, Q. C., a member of the committee which framed the English act, who was recommended by Judge Chalmers as one of the three best authorities in England on the law of bills and notes.

As Judge Brewster remarks, "No keener weapon than that wielded by the accomplished Dean of the Harvard Law School could be turned against the Negotiable Instruments Law." Professor Ames knows more about the law of bills and notes from the student's standpoint than any one else in this country. Whatever one's conclusions may be as to the soundness of his criticisms, there is little doubt that few, if any, of the vulnerable points in the act have escaped his notice, and that the sections he criticises are

¹ Crawford's An. N. I. L. Preface.

² 14 Harvard Law Review 241; 14 Harvard Law Review 442.

³ 10 Yale Law Journal 84; 15 Harvard Law Review 26.

those most likely to come up for construction. A familiarity with his criticisms and with Judge Brewster's replies cannot but aid both the bench and bar in giving some sections of the act their proper meaning. This consideration, together with the difficulty of understanding the discussion in its present form, where the criticism of each section, the answer, replication, and rejoinder are spread out through four separate articles, has prompted me to write a review of the controversy.

Two general observations may be made, which should be borne in mind throughout the entire discussion. In the first place, no one can judge the new act fairly who does not realize that the Commissioners were attempting to *codify* the law.¹ Their aim was not to reform the law of negotiable paper. It was to state accurately and concisely the existing law. Of course, here and there it was necessary to choose between two or more conflicting views. Very frequently a section changes the law in a small minority of states which had departed from the almost uniform current of authority. Occasionally, though very rarely and only when there seemed to be no room for a difference of opinion, the law was deliberately changed. But the main, and almost the sole purpose of the framers of the Negotiable Instruments Law was to reproduce, as exactly as possible, that which the great weight of authority had declared to be the law.

Second, in construing some sections of the act, the language used must be given not a hyper-literal meaning, but a reasonable legal meaning, derived, to some extent, from a knowledge of the cases on which the sections are based. It would be a great achievement for a code to state the law, in every instance, in language capable of meaning only one thing, even to a man entirely without legal training and unacquainted with what the law was before the code. But it will be a long time before such a code is framed. Of course, in the great majority of instances the Negotiable Instruments Law does this. But it is not a serious reflection on the act

¹ The discussion between Professor Ames and Judge Brewster makes no attempt to take up the broad question as to the propriety and utility of codification. For a most learned and able argument against codification, the reader may be referred to a book by R. F. Clarke, Esq., of the New York bar, entitled "The Science of Law, and Law Making." The arguments in favor of at least a partial codification of such a branch of the law as that relating to commercial paper are concisely stated by Judge Brewster in a paper read before the American Bar Association in 1898 on "Uniform State Laws," which is reprinted in the report of the Ninth Conference of the Commissioners for Promoting Uniformity of Legislation in the United States.

that in some instances a familiarity with the cases on which the language of the act is based, is — if not necessary — at least very helpful in deciding what the language means. Indeed, Judge Brewster said to the American Bar Association, in discussing the new act in 1898, "Care has been taken to preserve, as far as possible, the use of words which have had repeated construction by the courts, and have become recognized terms in the law merchant."

With these observations we may proceed to consider the discussion of particular sections.

Section 3, par. 2: —

"An unqualified order or promise to pay is unconditional within the meaning of this act though coupled with a *statement of the transaction which gives rise to the instrument.*"

"What," asks Professor Ames, "do these words mean? Do they cover the case of a note coupled with the words 'given as collateral security for A.'s debt to the payee'? Such an interpretation, although a literal one, would be deplorable and would nullify several decisions."¹ It would, indeed, be deplorable, for such notes are clearly conditional and courts have uniformly refused to regard them as negotiable.

Judge Brewster's answer is that this clause does not apply to the case put since "a note 'given as collateral security' contains notice, upon its face, that the note is not an unconditional promise to pay, but conditional upon the non-payment of the principal debt." And he refers to Section 1, par. 2, which requires a negotiable instrument to contain "an unconditional promise or order to pay a sum certain in money." There is no danger that any court will ever make the innovation that would result from the "deplorable interpretation," indicated by Professor Ames. Nor could such a conclusion easily be reached from the language of the act. Without turning back to the first section, the very clause under discussion speaks only of "an *unqualified* order or promise." If "the statement of the transaction" contains a qualification of the order or promise, if it shows that the instrument is not payable at all events, but only on a contingency, the instrument can scarcely be said to contain "an unqualified order or promise." A fair and

¹ Robbins v. May, 11 A. & E. 213; Haskell v. Lambert, 16 Gray 592; Costello v. Crowell, 127 Mass. 293; 134 Mass. 280, 285; American Bank v. Sprague, 14 R. I. 410. Hall v. Merrick, 40 Up. Can. Q. B. 566.

reasonable reading of the section would scarcely require even the most literal interpreter to hold that this clause covers a note given as collateral. To do so, he would have to construe it as meaning, "a note is unconditional provided you start it with an unqualified promise, no matter how many qualifications and conditions are later embodied in the statement of the transaction which gave rise to the instrument." Such an interpretation would be far-fetched, not literal.

But Professor Ames makes another criticism of this clause of Section 3, which is less easily disposed of. The real purpose of this clause, as we learn from Mr. Crawford,¹ who drafted the act, and from Judge Brewster, is to cover the case of a note which contains a statement that it is given for a chattel, which is to be the property of the owner of the note until the note is paid. Such notes are usually regarded as negotiable.² Several states, however, have taken the opposite view, holding that such notes are non-negotiable,³ and it was to bring the latter states into accord with the more general view and unify the law on this point, that this clause was inserted. But will it accomplish this object? That is Professor Ames' further criticism. The only case touching the point is of little or no assistance,⁴ but it may seriously be doubted whether this clause will overrule the decisions at which it was aimed. It does not cover a note "given as collateral security" because such a note "contains notice, upon its face, that the note is not an unconditional promise to pay." Suppose a judge decides that a chattel note (one containing a statement that it is given for a chattel which

¹ Crawford. An. N. I. L. 12.

² *Chicago Co. v. Merch. Bank*, 136 U. S. 268; *Howard v. Simpkins*, 69 Ga. 773; *Choate v. Stevens*, 116 Mich. 28; *Heard v. Dubuque Bank*, 8 Neb. 10; *Mott v. Havana Bank*, 22 Hun 354; *National Bank of Royersford v. Davis*, 6 Montg. Co. (Pa.) 99; *Kimball v. Mellon*, 80 Wis. 133.

³ *Sloan v. McCarty*, 134 Mass. 245; *South Bend Co. v. Paddock*, 37 Kan. 510; *Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Deering v. Thorn*, 29 Minn. 120.

⁴ *Third Bank v. Spring*, 28 N. Y. Misc. Rep. 9. White, J., held that a note, containing a statement that it is given for a piano, the title of which shall remain in the payee until the note is paid, is not a negotiable instrument. After so holding, he simply remarks that Section 3, par. 2, of the Negotiable Instruments Law "has no application here." This decision was reversed in 50 N. Y. App. Div. 66, the court making no allusion to the statute, but merely holding with the current of authority that such a note is negotiable. Judge Brewster points out that the note in this case was made in 1896 and negotiated in May, 1897, but that the New York Negotiable Instruments Law did not become operative until October, 1897, and, therefore, as Judge White said, had no application to the case. Whether Judge White meant that the act did not apply because it was not yet operative, or because the note under discussion was not covered by the section referred to, does not appear.

is to remain the property of the payee until the note is paid) is not an unconditional promise to pay. Would he feel that this clause covers such an instrument? And at least some of the courts which hold chattel notes non-negotiable do so on precisely this ground. *Sloan v. McCarty*.¹ By the instrument sued upon in that case, the defendant promised to pay Sloan, one month from date, \$85, for a roan horse known as A. M., "said horse to be and remain the entire and absolute property of the said Sloan until paid for in full by me." The court said this note contained a conditional promise and so was non-negotiable. "If the money were not paid by the defendant at the time specified, the plaintiff could, if he chose, rescind the conditional sale and the defendant would then have no right to the horse, and would no longer be liable to pay the note. . . . If the horse should die within the month without fault on the part of the defendant, the plaintiff would be disabled from transferring the title and could not maintain an action on the contract."² Now, if Section 3, par. 2, does not cover a note "given as collateral security" for the very reason that such a note shows on its face that the promise contained in it is conditional, why will it cover a "chattel note" in jurisdictions which say that a chattel note shows on its face that the promise contained in it is conditional? That is Professor Ames' second criticism, to which no answer seems to be furnished in Judge Brewster's replies.

Professor Ames' conclusion is that Section 3, par. 2, is "either useless or provocative of litigation."

If, by "useless" is meant that it will fail to overrule the cases which hold chattel notes non-negotiable on the ground that they are conditional promises, this subsection may prove to be useless. Aside from this, however, it may not have been unwise to insert it in the act. The clause is copied almost word for word from Section 3, par. 3, of the English act,³ which was inserted to codify the

¹ 134 Mass. 245 (1883).

² The Minnesota courts give the same reason for their decision as those of Mass. *Third Nat. Bank v. Armstrong*, 25 Minn. 530.

But the Kansas courts (also instanced by Professor Ames) hold chattel notes to be non-negotiable, not so much on the ground that they are *conditional*, as that they contain stipulations other than the promise to pay money. *Killan v. Schoeps*, 26 Kan. 310 Pg. 312; *South Bend Co. v. Paddock*, 37 Kan. 510. Should Kansas adopt the act, her courts might, therefore, hold that the section under discussion changed the above cases.

³ English Bills of Exchange Act (August 18, 1882), 45 and 46 Vict. C. 61. Sec. 3-3: "An unqualified order to pay coupled with a statement of the transaction which gives rise to the bill, is unconditional." And by Sec. 89 the above clause applies to promissory notes.

decisions of cases¹ in which the instruments sued on contained language which, while absolutely unnecessary to a negotiable instrument, nevertheless did not qualify the promise in any way, nor contain any independent promise, but amounted to nothing more than a brief description of how the instrument came to be drawn — a statement of the consideration for which it was given — a memorandum that collateral security for the note had been given — an indication of the nature of the transaction. The courts held that such language did not affect the negotiable character of the instrument. Referring to this subsection, Mr. Arthur Cohen says: "The words in the English act correctly state what the English law is." The courts of this country do not differ on this point from those of England. They have held almost unanimously that language such as that used in the English cases referred to does not destroy the negotiable character of a bill or note.² Section 3, par. 2, of the new act will doubtless be regarded here as it has been for twenty years in England, as a codification of this rule of law, and as such may serve a useful purpose.

Whether the clause will be provocative of litigation remains to be seen. It has not given rise to a single case in England, where it has been in force for twenty years, nor has any case arisen under it as yet in this country. It will quite likely come up for construction in the very few jurisdictions which have hitherto held chattel notes non-negotiable, but it is extremely unlikely that any lawyer will ever attempt to have it applied to notes "given as collateral security." Therefore, about the worst that can be said against it is that it may not accomplish quite all that its framers intended.

Section 9, par. 3: —

"The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable."

Professor Ames levels two criticisms at this subsection. In the first place, he says that such a rule "ignores the tenor of the instrument," meaning, for one thing, that to say an instrument payable to "John White or order" is payable "to bearer" is to ignore what the instrument itself says — even though no such person

¹ *Houssoullier v. Hartsinck*, 7 Term Rep. 733 (1798); *Griffin v. Weatherby*, L. R. 3 Q. B. 752 (1868).

² 4 Am. and Eng. Encyc. of Law, 2d Ed. 89 and cases there cited. 1 Ames' Cases on "Bills and Notes." Note on p. 56. *Devenny v. League Island Loan and Bldg. Assn.*, 9 W. N. C. (Pa.) 127; *Citizens' Nat. Bank of Towanda v. Piolett*, 126 Pa. 194.

as John White exists. The correct way to interpret such an instrument, says the critic, is to give it the effect of an instrument payable to the order of and indorsed by the drawer or maker respectively. Thus a bill drawn by Andrew Smith payable "to the order of John White" (a fictitious payee) and indorsed in the name of John White ought to be treated as a bill drawn by Andrew Smith payable to his own order, and by him indorsed — this result being reached by regarding the bill as payable to Andrew Smith by the name of John White.¹ Professor Ames objects to treating any such instrument as payable "to bearer." Undoubtedly there are strong arguments in favor of such a view, and the whole question of fictitious payees might have been simpler and more logical had they originally prevailed. As a matter of fact, however, the act on this point merely codifies that which has been the settled law of England and America for more than a century. The arguments in support of Professor Ames' view were fully presented both to the Court of King's Bench and to the House of Lords in the leading case of *Minet v. Gibson*,² decided in 1791. Both courts repudiated them and held that the holder in due course of a bill payable to the order of a fictitious payee could, as against the drawee who accepted knowing that no such person existed, declare on the bill as payable to bearer and recover.³ Lord Chief Baron Eyre delivered a powerful dissenting opinion. "His reasoning," Professor Ames has said, "has never been refuted."⁴ It is equally true that it has never been followed. *Minet v. Gibson* has been practically unanimously followed both by English and American courts.⁵ It was followed, moreover, in the English Bills of Exchange Act,⁶ and it would have been strange indeed if

¹ Professor Ames has long insisted that this is the correct way of interpreting such instruments. See Ames' Cases on "Bills and Notes," Vol. 2, Summary, p. 864, published in 1881.

² 1 H. Blackstone, 569.

³ *Minet v. Gibson* is universally regarded as the leading case on this point, though there had been several earlier decisions to the same effect. *Tatlock v. Harris*, 3 T. R. 174; *Vere v. Lewis*, 3 T. R. 182; *Collis v. Emett*, Term Rep. C. P. 313.

⁴ Ames' Cases on "Bills and Notes," Vol. 1, p. 421.

⁵ *Gibson v. Hunter*, 2 H. Bl. 187, 288; 6 Bro. P. C. 235, s. c.; *The Royal Bank of Scotland*, 19 Ves. 310; *Farnsworth v. Drake*, 11 Ind. 101; *Smith v. Mechanics' Bank*, 6 La. An. 610, 624 (semble); *Bartlett v. Tucker*, 104 Mass. 336, 344 (semble); *Rogers v. Ware*, 2 Neb. 29 (semble); *Foster v. Shattuck*, 2 N. H. 446; *Plets v. Johnson*, 3 Hill 112; *Stevens v. Strang*, 2 Sandf. 138; *Forbes v. Espy*, 21 Oh. St. 474, 483 (semble); *Hunter v. Blodget*, 2 Yeates, 480.

⁶ It may aid comparison to print the corresponding sections of the two acts

the framers of the American act, who were *codifying* the law, who were framing a code, moreover, which would have to run the gauntlet of nearly fifty legislatures, had attempted anything so inexpedient as the overthrow of such a well established and universally accepted rule.¹

The second criticism of subsection 9, par. 3, is that such an instrument is, under the act, payable to bearer *without being indorsed*, and that this, also, ignores the tenor of the instrument. "Nor is there any judicial precedent or mercantile custom," says Professor Ames, "in support of the notion that a bill payable to a fictitious payee, but not indorsed in the name of such payee, is payable to bearer. In all the reported cases, instruments payable to a fictitious payee have been indorsed in the name of such payee before negotiation." That is substantially true.² If such an instrument requires no indorsement, a departure has been made from what has been supposed to be the law — and Professor Ames and Judge Brewster agree that the new act dispenses with the necessity of an indorsement. Indeed, any other reading of it seems impossible, though whether an indorsement is necessary under the English act has never been decided, and seems fairly open.³

together. English Bills of Exchange Act, Section 7, par. 3: "When the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

The Negotiable Instruments Law, Section 9, par. 3: "The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable."

¹ The rule was originally based on the doctrine of estoppel. Prior to the English act (1882) a recovery was never allowed except against a defendant who became a party to the bill knowing that the payee was fictitious. See *Minet v. Gibson*, 1 H. Bl. 569, and Review of Cases by Bowen, L. J., pp. 257-260, in *Vagliano Bros. v. Bank of Eng.*, L. R. 23 Q. B. D. 243 (1889). The English act, however, rendered the defendant's knowledge immaterial, providing merely that a bill may be treated as payable to bearer when the payee is fictitious. The American act does not go so far, however, for it contains the proviso "and such fact was known to the person making it so payable." But if the maker or drawer knows the fact, then the bill is for all purposes payable to bearer, and thus a drawee, who accepted in ignorance of the fact, would be liable.

² In New York, however, it has been held for many years that a bill or note payable to the order of a fictitious payee is payable to bearer without being indorsed by the maker or payee. *Plets v. Johnson*, 3 Hill, 112; *Central Bank of Brooklyn v. Lang*, 1 Bosworth, 203; *Irving, N. B. v. Alley*, 79 N. Y. 536.

³ It might be argued that the words "may be treated as payable to bearer" used in the English act mean that the bill may be so treated only when regular in all other respects, *i. e.*, among other things, when properly indorsed. Judge Chalmers, the draftsman of the English act, says of this subsection: "When a bill is payable to the order of a fictitious person, it is obvious that a genuine indorsement can never be obtained, and in accordance with the language of the old cases and text-books, the act

Judge Brewster defends the change. He says: "Surely it is more logical to hold that a note which purports to be payable to a person when there is no such person, and the maker knows it, must have been intended to be payable to bearer, than to hold that somebody must assume the name of such fictitious person and make a false indorsement in order to give title to the note." There is much common sense in that. But the trouble is that title to a note payable to order is derived through the indorsement on the back of it. What "must have been intended" by a maker who names a fictitious payee it is extremely hard to say. Moreover, both commercial practice and legal theory tend more and more to disregard everything except that which actually appears on the instrument. When A. makes his note payable to "John White or order" all our notions about negotiable paper require that John White be written on the back of this note, even though no such person as John White exists. It seems necessary for form's sake. To dispense with the necessity for it gives a decided jolt to our ideas. Aside from this, however, it is difficult to see how any harm can result from the change. In the first place (and though this does not touch the theory of the criticism, it does touch its practical worth) notes payable to fictitious payees and unindorsed, will be about as plentiful as counterfeit dollars labelled "counterfeit." Either the maker or the person to whom he delivers the instrument will indorse it in the name of the fictitious payee. Why? Because otherwise no one would discount it. It would be patently irregular on its face. An indorsement is necessary to give such a note *any commercial value*. Professor Ames supposes one case which, in his opinion, works an injustice on the maker. He says, "By the combined effect of this section and section 16¹ if a note payable to a ficti-

puts it on the footing of a bill payable to bearer. But inasmuch as a bill payable to one person but in the hands of another is patently irregular, it is clear that the bill should be indorsed, and perhaps a *bona fide* holder would be justified in indorsing it in the payee's name. It might have been better if the act had provided that a bill payable to the order of a fictitious person might be treated as payable to the order of anyone who should indorse it, or, in other words, as indorsable by the bearer." Chalmers' Bills of Exchange, 5th Edition, page 22. From this, it would appear that the failure of the English act to require an indorsement was a mere oversight — though the use of the words "may be treated" furnishes a method of correcting the omission. Judge Brewster's readiness to defend the change in the American act seems to indicate that the change was intentional. Except for this, one would suppose that it had been an oversight.

¹ Section 16 provides, *inter alia*, "Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed."

tious payee were stolen from the maker and indorsed by the thief in the name of the payee, the maker would be liable upon the note to any holder in due course. For, the note being already payable to bearer, the forged indorsement in the payee's name would be of no legal significance. Such a result would be a cruel injustice to the maker."

Clearly the maker would be liable in such a case, but is this a "cruel injustice"? If the note were stolen when made expressly payable to bearer or when made payable to a fictitious payee, and then indorsed, there would be no injustice in holding the maker. How much more sympathy is he entitled to when (though not indorsing the note) he deliberately chooses to name a payee, well knowing that there is no such person in existence. If it is merely a question of the actual justice meted out, it takes a nice distinction and a very tender heart to produce much sympathy for the maker in the case supposed. Both parties are innocent of fraud, but it is the maker's conduct that made the fraud possible and he should bear the loss. Even in the rare case where no indorsement whatever appears on the back of the note, no actual injustice is done in holding the maker liable. The real worth of the criticism lies in its technical point, namely, that this subsection permits the transfer, without indorsement, of an instrument which, for all that appears on the face of it, requires an indorsement to make a valid transfer.

It remains to notice one or two other points before passing this subsection.

In his first paper, Judge Brewster seemed to suggest that notes payable to the order of unincorporated associations or to the estates of deceased persons are payable to bearer by force of Section 9, par. 3. Professor Ames performs a real service in disposing of such a notion in vigorous fashion, though the discussion on this point was evidently due to a misunderstanding, as in his second paper, Judge Brewster disclaims holding any such view as that attributed to him. The point, however, is worthy of notice, since both Mr. Crawford and Mr. Selover, in their published Annotations of the act, seem to have gone astray on this point and to seriously regard notes payable to the estate of a deceased person as payable to bearer.¹ Such an interpretation is opposed alike to reason and authority, and should it prevail, much harm might

¹ "Thus a note made payable to the order of the estate of a deceased person is a promissory note with a fictitious payee, and, where it has been negotiated by the maker,

result. Moreover, such was not the law prior to the act, and there is absolutely nothing in this subsection which either suggests or warrants such a change.

The meaning of the words "fictitious or non-existing person," used in the corresponding section of the English act, came before the House of Lords in the case of *Vagliano Bros. v. The Bank of England*.¹ The plaintiffs in that case were in the habit of accepting bills drawn on them by "V" (their foreign correspondent) in favor of *Petridi & Co.*, a foreign firm. One Glyka, the plaintiffs' clerk, fraudulently drew a bill in V.'s name on the plaintiffs, payable to *Petridi & Company*. After the plaintiffs had accepted it, Glyka forged *Petridi & Company's* name and had the bill cashed by the Bank of England. Of course, Glyka never intended that the bill should be delivered to *Petridi & Company* or that they should receive any money on it, the whole transaction being a fraud on his part. The question came up whether this was a bill payable to bearer within this subsection of the English act. The House of Lords, reversing the lower court, held that *Petridi & Company* was a fictitious person within the act and that the bill was therefore payable to bearer, but the opinions delivered in both courts disclose a wide difference of opinion as to the true meaning of the words "fictitious or non-existing person."² The possibility of litigation

is deemed, as against him, to be a note payable to bearer. *Lewisohn v. Kent*, 87 Hun 257." *Crawford's Neg. Inst. Law*, p. 18.

"When the name of the payee does not purport to be the name of any person, as in the case of instruments payable to an estate, . . . the paper is payable to bearer. *Scott v. Parker*, 5 N. Y. Supp. 753; *Lewisohn v. Kent*, 33 N. Y. Supp. 826." *Selover's Neg. Inst. Law*, p. 73.

True, there is a dictum to this effect in *Lewisohn v. Kent*, but, as Professor Ames justly says: "It is a perversion of language to call the payee in such a note a fictitious or non-existing person." In *Shaw v. Smith*, 150 Mass. 166, and *Peltier v. Babillon*, 45 Mich. 384, such a note was properly interpreted as a note payable "to the legal representatives of A." As to bills payable to an unincorporated company, Judge Chalmers says: "The signature of a fictitious person must be distinguished from the signature of a real person using a fictitious name, — for instance, John Smith may trade as 'The Birmingham Hardware Company' and sign accordingly. *Schultz v. Astley* (1836), 2 Bing. N. C. 544." Chalmers' *Bills of Exchange*, 5th Edition, p. 23.

¹ L. R. 23 Q. B. D. 243 (1889) and L. R. 16 Appeal Cases 107 (1891).

² The majority in the Lower Court, speaking through Bowen, L. J., held that *Petridi & Company* were not fictitious payees, inasmuch as they were not known to be such by the party sought to be charged, *i. e.*, the acceptor. "By the words 'The bill may be treated as payable to bearer' must surely be understood 'treated as against those who are to be made liable for the bill.' The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. . . . If the obligations of the acceptor are in question, and the acceptor is

of the same sort under our act might have been avoided by substituting "when the drawer or maker knowingly makes the instrument payable to the order of a *fictitious or non-existing payee, or a living person not intended to have any interest in it,*"¹ though probably the words of the act will prove to be sufficiently precise.

the person against whom the bill is to be so treated, 'fictitious' must mean fictitious as regards the acceptor and to his knowledge." Such an interpretation could scarcely be made under our act, which, instead of saying "may be treated as payable to bearer," says "is payable to bearer," and clearly points out the only person whose knowledge is material, *i. e.*, the person making it so payable.

Lord Bramwell, in a trenchant dissent in the House of Lords, held that Petridi & Company was not a "fictitious or non-existing person" within the meaning of the act, since it was a real, existing firm, "as identifiable as N. W. Rothschild & Company, — Glyn, Mills, Currie & Company, — as the Bank of England itself." On the other hand, Esher, M. R. (dissenting in the Lower Court), thought that "fictitious" must embrace an existing person; for "if 'fictitious' in this subsection does not apply to the name of an existing person, who is not really intended to be the payee, I can see no distinction between 'fictitious' and 'non-existing' in the subsection." Lord Bramwell characterized this argument as "very feeble. . . . A prudent draughtsman does not accurately examine whether a word will be superfluous. He makes sure by using it."

Judge Chalmers says that the words "or non-existing" seem superfluous, and that they probably were intended to cover the case of *Ashpittel v. Bryan* (1863), 32 L. J. Q. B. 91, in which, by arrangement between the indorsee and acceptor, a bill was drawn and indorsed in the name of a deceased person. Chalmers' Bills of Exchange, 5th Edition, pp. 21 and 22.

Halsbury, L. C., held that if the person named in the bill is not the real *payee*, then, although a real *person*, he is "fictitious" within the statute. But Lord Selbourne thought the statute did not extend to the case of a real person falsely represented as payee, because "the Legislature has here described 'a *person*' as 'fictitious or non-existing' instead of saying 'when the *payee* is fictitious or non-existing.'"

The majority of the House of Lords held (though for very different reasons) that Petridi & Company were fictitious payees within the meaning of this subsection, and that therefore the bill was payable to bearer.

See also *Clutton & Co. v. Attenborough*, L. R. 2 Q. B., pp. 306 and 707. The plaintiffs' clerk, by fraudulently representing that work had been done for them by one George Brett, induced them to draw checks payable to the order of George Brett in payment of the pretended work. In point of fact, no such person as George Brett existed. The clerk then forged Brett's indorsement and cashed the checks. Held, that Brett was none the less a fictitious or non-existing person within the act, because at the time of drawing the checks the plaintiffs supposed him to be a real person. Therefore these checks were to be treated as payable to bearer. The decision in this case would be different under the American act, which insists that the fictitious character of the payee must be known to the person making the instrument so payable.

¹ The words in italics are practically Professor Ames' suggestion, except that he uses "person" instead of "payee." It is submitted that the latter word would be better. "In truth, if strictly construed, the words 'fictitious person' are a contradiction. One may pretend there is a person when there is not. One may assume a character which does not belong to one. But to satisfy the word 'fictitious,' as applicable to a person, is assuming in one part of the proposition what is denied in the other." Per Halsbury, L. C., in *Vagliano Bros. v. The Bank of England*. In addition to this

Finally, it may be noted that the words used in the English act "*may be treated as payable to bearer*" are less fortunate than the wording of our act, which says, "*is payable to bearer when,*" etc. Under our act, it is payable to bearer for all purposes just as completely as if it had indeed been expressly so drawn. In England, however, the question may arise, "Who may so treat it?" In *Vagliano Bros. v. The Bank of England*, Lord Bramwell insisted that this subsection was inserted solely for the benefit of the holder, but the majority thought that the bill might be treated as payable to bearer by any person whose rights or liabilities depended upon whether it was a bill payable to order or to bearer.

Section 9, par. 1-5:

"The instrument is payable to bearer (1) when it is expressed to be so payable; or (5) when the only or last indorsement is an indorsement in blank."

Section 40, which is involved in the discussion of Section 9, par. 1-5, reads:

"When an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

One or two preliminary observations may aid to a proper understanding of the criticisms made of these sections.

Blank indorsements were unknown to the early law of Bills and Notes, which required that the name of the indorsee should be contained in the indorsement. A practice later arose by which the payee often wrote only his own name on the back of a bill, leaving a blank above his signature for the name of the indorsee. Hence the term "blank indorsement." The bill being transferred in this condition, the transferee or any subsequent holder has an implied authority "to write above the signature an order of payment to himself, or to bearer, or to anyone to whom he may wish in turn to transfer the bill; and the blank indorsement, when so filled up, takes effect by relation from the time of the original delivery by the indorser."¹ The transferee or any subsequent

rather fine-spun reason, the use of the words "*fictitious person*" presented a real difficulty to Lord Selbourne. See extract from his opinion, cited in the preceding note on *Vagliano Bros. v. Bank of England*.

¹ Ames' Cases on "Bills and Notes," vol. 2, p. 837.

holder is the indorser's agent for this purpose. For a long time it was necessary to exercise this authority and fill out all the blank indorsements on a bill at or before trial. Gradually this last requirement was dispensed with, and thus a bill payable to the order of A. — with A.'s name written on the back (no indorsee being named) could be recovered on by the holder.¹ Such instruments are said to be payable to bearer, and indeed they are so while the indorsement remains blank, but although the *necessity* of filling up a blank indorsement has been dispensed with, the *right* to do so has never been abridged, and the holder of a bill or note has to-day, as he always had, the right to fill up any or all blank indorsements on the instrument and thus make it payable only to order.

It is to be observed — and this is important — that these rules in no way violate the original tenor of the instrument. The maker has promised to pay "A. or order," and A., by signing his name with a blank above it and handing it to B., authorizes B. or any subsequent holder to designate the person entitled to receive payment. Until they do so designate him, the holder is the man entitled. Now, suppose B. indorses specially to C. or order, and then C. transfers the paper to D. by mere delivery. Should D. be allowed to sue the maker as on a note payable to bearer? No, for since the maker has promised only to pay to A.'s order — and since A. has given B. or any holder authority to designate the one to whom the sum shall be paid — and since B. has designated that it shall be paid "to C. or order" — plainly no one who cannot trace title through C. comes within the terms of the maker's promise. That is the logical view, and it is the view that the merchants and bankers adopted, *i. e.*, a blank indorsement of a note payable to order is controlled by the subsequent special indorsement.

But the courts held otherwise. In the case of *Smith v. Clarke*,² decided in 1794, a bill originally payable to order, was indorsed in blank by the payee and was subsequently indorsed specially. Lord Kenyon held that the bill was payable to bearer as long as the first

¹ This added a new term to the indorser's order, *i. e.*, that until the blank was filled up the instrument should be payable to bearer.

² Peake, 225. Although in a case which arose some years earlier, *Ancher v. Bank of England*, 2 Douglas, p. 637 (1781), Lord Mansfield evidently agreed with the understanding of merchants that a blank indorsement was controlled by a subsequent special indorsement. However, the exact point decided in *Smith v. Clarke* was not involved in that case.

indorsement remained blank, and that the holder might therefore strike out the special indorsement and recover as on a bill payable to bearer. *Smith v. Clarke* has been generally followed both in England and America.¹ This decision was opposed to the view held by the business community, and so, in 1882, the framers of the English act, in order "to bring the law into accordance with the mercantile understanding, by making a special indorsement control a previous indorsement in blank,"² provided in Section 8, par. 3:

"A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank."

The provisions of Section 9, par. 1-5, of the American act are the same as those of the English act and were inserted for the same reason.

It is further to be observed that *Smith v. Clarke* and all of the cases which follow it are cases of instruments *originally payable to order*. None of these cases contains a syllable about instruments originally made payable to *bearer*.³ There is an important distinction between the two kinds of instruments. For reasons which I have referred to above, the custom of merchants, which has now been adopted by both the English and American acts, says that in the case of an instrument originally payable to order, a blank indorsement is controlled by a subsequent special indorsement, because in such a case the maker's promise embraces only those who make title through the special indorsement. But a note *originally payable to bearer* is another matter. It is a violation of the plain tenor of such a note to treat it as other than payable to bearer. That is the maker's absolute promise — to pay the bearer. His promise cannot be qualified or changed in any way by a subsequent holder. The only effect of a special indorsement on such a note is that the *indorser* can be held only by those who make title through his indorsement.⁴

¹ *Walker v. MacDonald*, 2 Wels Hurl & Gordon, 526 (1848); *Houie v. Bailey*, 16 La. 213 (1840); *National Bank v. Haskins*, 101 Mass. 370 (1869); *Houry v. Eppinger*, 34 Mich. 31 (1876); *Watervliet Bank v. White*, 1 Denio 608 (1845); *Pentz v. Winterbottom*, 5 Denio 51 (1847); *French v. Barney*, 1 Iredell 219 (1840); *Mitchell v. Fuller*, 15 Pa. 268 (1850); *Rand v. Dovey*, 83 Pa. 280 (1877). *Contra*: *Myers v. Friend*, 1 Randolph 12 (1821).

² Chalmers' Bills of Exchange, 5th Edition, p. 24.

³ But see *Johnson v. Mitchell*, 50 Tex. 212. — ED.

⁴ Story, Bills of Exchange, Section 207; Wood's Byles on Bills and Notes, 151.

This distinction between instruments originally payable to bearer and instruments originally payable to order and then indorsed in blank is preserved both in the English and American acts. Under both acts, a note originally payable to bearer and specially indorsed continues payable to bearer, while an instrument originally payable to order is payable to bearer only when the last indorsement is in blank. Professor Ames says that this distinction is "illogical and undesirable," though he gives us no reasons. Judge Brewster's reply is equally brief: "The reason why such a rule is 'illogical and undesirable' is not clear." It is submitted that, for the reasons noted above, this distinction is decidedly "logical," and inasmuch as it appears to obtain generally throughout the business community, its continued observance by the Code would seem to be "desirable."

Professor Ames further criticises this subsection, as follows:

"If an instrument indorsed in blank and subsequently indorsed specially, so that it is no longer payable to bearer, is transferred by the special indorsee by delivery merely, the transferee cannot sue parties prior to the special indorser in his own name, but only in the name of his assignor. This puts the assignee to unnecessary inconvenience. As owner of the instrument, although not, according to this subsection, holder, he ought to have the right to strike out the special indorsement, thus making the instrument once more payable to bearer, and as bearer to sue upon it in his own name." *I. e.*, A. makes a note to B. or order. B. indorses in blank. C. indorses it "to D. or order" and D. delivers it (without indorsement) to E. Professor Ames thinks that E. should have the right to strike out C.'s indorsement and sue A. or B. as on a note payable to bearer.

Why should he have this right? It has long been the law (and still is under Section 48)¹ that the holder may strike out any indorsements which are not necessary to his title. The law has never permitted him to strike out indorsements which are necessary to his title.² Now, so long as Lord Kenyon's doctrine³ prevailed, the holder had the right to strike out all indorsements subsequent to the first blank indorsement because the instrument

¹ Sec. 48: "The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers, subsequent to him are thereby relieved from liability on the instrument."

² Story, Promissory Notes, Section 208.

³ *Smith v. Clarke*, *supra*.

was by that first blank indorsement payable to bearer and a subsequent special indorsement did not change its tenor and was therefore not necessary to his title. But this subsection was inserted for the express purpose of doing away with Lord Kenyon's doctrine. Everybody agrees that a blank indorsement of an instrument originally payable to order ought to be affected by a subsequent special indorsement. What does this change mean, then? Why it means (taking the case Professor Ames supposes for us) that by virtue of the special indorsement by C. the note has again become payable *only to order*, and therefore C.'s indorsement cannot be stricken out by a subsequent holder *because it is necessary to his title*. Suppose D. had in his turn indorsed specially to E. The latter (though now a *holder* within the meaning of the act) could not strike out the indorsements of C. and D. Why? Because the instrument being now again payable to order only, the indorsements of C. and D. are necessary to his title, and so Section 48 gives him no right to strike them out. Professor Ames says, "As owner of the instrument, he ought to have the right." But ownership of a bill or note gives the holder no right to alter it — to change the tenor of any of the promises which it evidences.

Judge Brewster answers this criticism, however, in another way. He first agrees with Professor Ames that E. (in the case supposed) ought to be allowed to strike out C.'s special indorsement, and then he tries to give him this right.¹ He first points to Section 48, which gives the right to strike out indorsements not necessary to title. But Professor Ames reminds him that Section 48 confers this right only on *holders* and that E. is not a holder, for "holder" is defined in Section 191 to mean "The payee or indorsee of a bill or note who is in possession of it, or the bearer thereof," and "bearer" is defined by the same section to mean "The person in possession of a bill or note which is payable to bearer." Both ignore the fact that in the case supposed C.'s indorsement is necessary to E.'s title.

¹ Mr. Farrell answers Professor Ames as follows: "In answer to this, it is necessary only to say that in most jurisdictions he may bring suit in his own name, being the real party in interest." (The Negotiable Instruments Law, by Jno. Lawrence Farrell. Brief of Phi Delta Phi, Vol. III, No. 2, First Quarter, 1901.) But the statutes which permit an assignee to sue in his own name have effected merely a procedural change. He is still an assignee merely and can be met by any defence arising out of the instrument which could be pleaded against the assignor. The question is not, in whose name shall E. bring suit (a minor point), but it is, what right can E. assert.

In order to give E. the right to sue the maker, Judge Brewster next refers to Section 40, which provides *inter alia* that "when an instrument payable to bearer is endorsed specially, it may nevertheless be further negotiated by delivery."

"This section," says Judge Brewster, "which authorizes a transfer by delivery seems to give the transferee the right to sue in his own name, otherwise the note would not be negotiated within the meaning of the act." But if Section 40 applies to a note originally payable to order — then indorsed in blank and made payable to bearer — and then indorsed specially — if such an instrument may still be negotiated by delivery, then the rule of *Smith v. Clarke* is still in full force, and Section 9, par. 5, which was inserted to overthrow *Smith v. Clarke*, is a nullity. That carries us to the next criticism.

Professor Ames insists that Section 40 completely nullifies Section 9, par. 5, and that for this reason only may E. sue the maker in the case supposed. His position is that Section 9, par. 5, was inserted to change the old rule that an instrument "payable to bearer (or indorsed in blank)"¹ although afterwards specially indorsed, was still negotiable by delivery — that "then, in apparent forgetfulness of the effect of Section 9, par. 5," Section 40 was inserted providing that an instrument payable to bearer and indorsed specially is still negotiable by delivery, the special indorsee being liable only to such as make title through his indorsement, and that this section (40) thus changes the law back to its former state.

Judge Brewster's answer is:

"Section 40 is claimed to be repugnant to Section 9, par. 5, but this is not so. Section 9, par. 5, declares a note to be payable to bearer when its last indorsement is in blank; *40 relates to a note when the last indorsement is special, and provides that it may then be transferred by delivery*,² in order to cover cases of good faith where title is frequently passed in that way, by persons ignorant of mercantile usage."

It is submitted that that is no answer, and for this reason. If a bill *may be transferred by delivery*, it is payable to bearer. Section 40, on Judge Brewster's reading, permits a bill whose last

¹ These are Professor Ames' words; but if by "Payable to bearer" he means *originally* payable to bearer, it is submitted that neither *Smith v. Clarke* nor any of the cases which follow it say anything about such instruments. They are all cases of instruments originally payable to order.

² The italics are the reviewer's.

indorsement is special to be payable to bearer, yet Section 9, par. 1-5, was inserted to permit only bills originally payable to bearer or whose last indorsement is in blank to be payable to bearer.¹

I submit that in one way and one way only can these two sections be harmonized. If Section 40 be interpreted as applying only to instruments originally payable to bearer, there can be no difficulty as to either section.² True, it reads merely "When an instrument payable to bearer is indorsed specially," etc., and there is no denying that if it meant only an instrument originally payable to bearer it should have said so. At the same time, the words used are commonly understood to describe an instrument originally payable to bearer, and there is the additional reason that unless these words are so interpreted here, the section is diametrically opposed to Section 9, par. 5, a conclusion plainly to be avoided if possible. Again, Section 9, par. 5, can be construed in only one way, while Section 40 may be construed either as being opposed to or as being in harmony with it. Moreover, such an interpretation would be good law. At the opening of the discussion of these sections, some reasons were submitted why the distinction between instruments originally payable to bearer and those originally payable to order and indorsed in blank, was both logical and desirable. However this may be, such a distinction is certainly

¹ Judge Brewster cites the following passage from the new Norton Horn Book by Mr. Tiffany, p. 116, to prove that Section 40 and Section 9, par. 5, are in harmony: "An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards specially indorsed, is still payable to bearer; except as to the special indorser, who, on such an indorsement, after such an indorsement, is only liable on his indorsement to such parties as make title through it."

It is submitted that the above tends to prove just the reverse, because if by Section 40 an instrument originally payable to order, then indorsed in blank, and then specially indorsed, is still payable to bearer, Section 9, par. 5 (which intended to make only instruments whose last indorsement is in blank payable to bearer) is nullified.

Mr. Crawford, the draughtsman of the act, actually regards Section 40 as embodying the decision of *Smith v. Clarke* (Crawford's Annotated Negotiable Instruments Law, p. 41). Yet admittedly Section 9, par. 5, was intended to overthrow that decision.

² (Supplementary Note. In commenting upon the above suggestion, Professor Ames has pointed out that Section 9-1 includes, not only instruments originally payable to bearer, but also instruments originally payable to order and indorsed by the payee expressly "Pay to bearer." 16 Harvard Law Review, 257. This seems clearly right, and it would seem to show that the writer's suggestion should be modified to this extent, that Section 40 should be construed as applying only to instruments *expressly* payable to bearer, thus including instruments originally so drawn, and also instruments originally drawn to order and then expressly endorsed by the holder "Pay to bearer." With this modification, the writer is still of opinion that the suggested construction of Section 40 would satisfactorily harmonize that section with Section 9-5.)

made in Section 9, par. 5, and it has been made without complaint for twenty years in the English act. The suggested interpretation of Section 40 preserves this and the two sections would be harmonious. By Section 9, par. 1, an instrument originally payable to bearer continues to be payable to bearer even though specially indorsed. But if it is specially indorsed, then by Section 40 "the person indorsing specially is liable as indorser only to such holders as make title through his indorsement," and this has always been the law.¹ By Section 9, par. 5, on the other hand, a bill originally payable to order is payable to bearer only when the only or last indorsement is in blank. Every one of these propositions is good law and accords with the understanding of merchants.

The remaining criticism of this subsection is unimportant. "If it is to be taken as it stands," says Professor Ames, "a note payable by A. to the order of B., and bearing the anomalous blank indorsement of C., would be payable to bearer. This, of course, would be an absurdity, but it is certainly true that the only indorsement is an indorsement in blank."

Professor Ames does not suggest that any merchant, any lawyer, any court would ever give the section such a construction. Nor does it require any stretch of the English language to arrive at its proper meaning. An anomalous indorser is not strictly an indorser at all. He is called one for convenience' sake, and a liability closely resembling that of an indorser is fastened upon him. But a section which uses the word "indorsement" with reference to the transfer of an instrument, could scarcely be regarded as having any reference whatever to an anomalous indorser. The words used in Section 9, par. 5, of the American act have been found entirely satisfactory in the English act throughout twenty years' experience, and there can be no reasonable doubt as to their meaning with reference to an anomalous blank indorsement.

Section 20:

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing the principal, does not exempt him from personal liability."

¹ Story, Bills of Exchange, Section 207; Wood's Byles on Bills and Notes, p. 151.

Professor Ames criticises this section as follows:

"Section 20 provides that a person who purports to sign an instrument in behalf of a named principal is not liable on the instrument, if he was duly authorized by the principal. By necessary implication he is liable on the instrument if not duly authorized.¹ This is a departure from the English act and from the almost uniform current of judicial decisions. This new rule involves a flat contradiction of the instrument, and the fiction works not justice, but injustice."

The section is copied from Article 95 of the German Exchange Law, and undoubtedly is a departure from the English act, under which the pretended agent is liable, not on the instrument, but for the damage resulting from the breach of his implied warranty of authority to sign for the principal. Mr. Crawford's original draft embodied the English rule,² but the Commissioners changed it and adopted the German rule deliberately and after mature consideration. It is scarcely true that in doing so they departed from "the almost uniform current of judicial decisions." There is a strong conflict of authority on the point, some states holding the pretended agent liable on the instrument itself, while a somewhat larger number hold him liable only for the damage resulting from the breach of his implied warranty of authority.³ The latter decisions seem correct on theory. As was said in *Hall v. Crandall*, if the instrument contains language which does not in legal effect charge the pretended agent, "or, in other words, contains language which, in legal effect, binds the principal only, the agent cannot be sued on the instrument itself, for the obvious reason that the contract is not his." He has falsely represented that he had authority to bind another, but he has not intended or attempted to bind himself, and courts which hold him liable on the contract

¹ "Mr. Crawford so interprets the section. Crawford's An. N. I. L. 26."

² Crawford, An. N. I. L. 26.

³ In the following states the pretended agent appears to be held liable on the contract itself: *Ormsby v. Kendall*, 2 Ark. 338 (but see *Dale v. Donaldson*, 48 Ark. 190); *Richie v. Bass*, 15 La. Ann. 668; *Terwilliger v. Murphy*, 104 Ind. 32; *Keener v. Harrod*, 2 Md. 63; *Byars v. Doores*, 20 Mo. 284; *Weare v. Gove*, 44 N. H. 196; *Clarke v. Foster*, 8 Vt. 98.

In the following states, the pretended agent is held liable not on the contract itself, but for the damage resulting from the breach of his implied warranty of authority: *Hall v. Crandall*, 29 Cal. 567; *Johnson v. Smith*, 21 Conn. 627; *Duncan v. Niles*, 32 Ill. 532 (but see *Frankland v. Johnson*, 147 Ill. 520); *Bartlett v. Tucker*, 104 Mass. 336; *Noyes v. Loring*, 55 Me. 408; *Sheffield v. Ladue*, 16 Minn. 388; *White v. Madison*, 26 N. Y. 117; *Bryson v. Lucas*, 84 N. C. 680; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 126.

itself "treat all matter which the contract contains in relation to the principal as surplusage, which is, in effect, to make a new contract for the parties concerned instead of construing the one which they made for themselves."¹

Judge Brewster's answer is: "One signing a note as agent for another should know and be able to show his authority. If he signs without authority, he alone in fact, and so in law, is the maker of the note, and he should be held liable accordingly." This view, though perhaps difficult to justify on the principles of contract, is supported by weighty authority,² and important practical advantages. The rule will tend to increase negotiability, by assuring the holder that if the pretended principal cannot be reached because of a lack of authority in the agent, a recovery may be had on the instrument itself against the agent. Then there is the additional advantage — which on reflection will appear to be of great importance — that the liability of the agent can be easily proved and the amount to be recovered ascertained by a mere inspection of the instrument, whereas if the only recovery were for damages resulting from a breach of warranty, a complicated set of disputed facts would often go to the jury, from which it would be difficult even to approximate the damage. The case which Professor Ames supposes, as proving the injustice of Section 20 may serve as an illustration of this. He says, "For example, A., mistakenly believing that he is duly authorized, signs a note, 'A., agent for B.,' and delivers it to C., the payee. At

¹ *Hall v. Crandall*, *supra*. Referring to the cases which hold the pretended agent liable on the instrument, Walton, J., said in *Noyes v. Loring*, 55 Me 408: "The inconsistency of such a doctrine, to use no stronger term, will be apparent by supposing that instead of a promise to pay money the pretended agent had signed a promise that his principal should marry the plaintiff within a given time, or do some other act which it was perfectly competent for the principal to perform, but which the agent could not. What would be thought of a declaration charging the pretended agent as a principal in such a case?"

² To the decisions referred to above, and the very high authority of the German Code, there may be added the opinion of Mr. Arthur Cohen, Q. C. (one of the framers of the English act, and admittedly one of the leading experts in England on this subject), who regards Section 20 as an improvement on the English act. He says: "This section certainly alters the law as it exists in England, but I think it very likely that the alteration is an improvement. The wisdom of the rule laid down in *Cohen v. Wright* has often been doubted. . . . I think the 20th Section should be retained, and may be considered as a practical improvement of the law, unless there be reason to suppose that merchants and bankers think it unjust. I agree with Mr. Brewster that much indulgence should not be shown in business to a person who professes to have authority when he is really acting without authority." Letter from Mr. Cohen to Judge Brewster, written March 31, 1901.

maturity B. repudiates the note. He is, however, at that time a bankrupt. A. is rightfully chargeable to C. on his implied warranty of authority, but only to the amount that C. might have recovered from B., if he had authorized the note. But under Section 20 A. is liable to C. for the face of the note." But, as Mr. Cohen points out, "It would be doubtful what could be recovered until the dividend was declared and the bankruptcy concluded; and in the case of the principal not being bankrupt, but being a man in bad credit, the question would have to be left to a jury what amount could probably be recovered from the principal. It may well be held that in actions on negotiable instruments against a person who professedly acts on behalf of another person, A., it would be inconvenient to allow the former to attempt to prove that probably the whole amount could not be recovered from A."

So the case stands about as follows: The rule discarded by the Commissioners works out the rights of the parties strictly on the rules of contract, and the balance of authority is in its favor. Under it, however, a plaintiff may encounter considerable difficulty and uncertainty in proving his case. The rule they have embodied in the act — while perhaps less clear on theory — is supported by the authority of several states, by the German Code, by some of the best expert opinion of England, and (besides tending to increase negotiability) enables a plaintiff to know and prove, with ease and certainty, the amount to be recovered. Of course, under such circumstances, individual opinion will differ somewhat as to which rule should have been chosen.

Section 22:

"The indorsement or assignment of the instrument by a corporation or by an infant *passes the property therein*¹ notwithstanding that from want of capacity the corporation or infant may incur no liability thereon."

Professor Ames says, "Does this section, like the corresponding section of the English act,² mean merely that the indorsee has the right to enforce payment from all parties prior to the infant,

¹ The italics are inserted by the reviewer.

² English Bills of Exchange Act, Sec. 22, par. 2: "Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto."

or does it mean that the indorsee becomes absolute owner of the instrument, so that he and his transferees, whether with or without notice of the infancy, may retain the instrument even against the infant? If it was intended to reproduce the effect of the English act on this point, it is unfortunate that the unambiguous language of that act was not retained. If, on the other hand, it was intended to make the infant's transfer of negotiable paper irrevocable, the section introduces a radical change in the law as to the rights of infants, and one that goes unnecessarily far in protecting an indorsee who knows that he is dealing with an infant."

There are two criticisms here. The first is that the language is ambiguous and may mean that the infant's indorsee takes an *indefeasible* title. As a proof of this, Professor Ames states that some members of Judge Brewster's committee assured him that this was the purpose of the section. Judge Brewster replies that the American and English acts mean the same thing and that he never heard of any other interpretation.

It is to be regretted that Professor Ames does not indicate the reasoning by which this section could be interpreted as giving an indefeasible title. It is the practically universal rule with us that an infant's acts are voidable merely and not void.¹ Of course, then, when he indorses a note he "passes the property therein." That is simply stating what has been the law for years. Without discussing whether he is or ought to be permitted later to annul his act, it is clear that his indorsement, which certainly is not void, "passes the property" in the note. As to his right to revest the title in himself, the act is silent. Now, a statute which decides one point and leaves another point untouched, is not ambiguous. Nor does Professor Ames tell us why the English act is any different from ours. The language there used is that the infant's indorsement "entitles the holder to receive payment of the bill, and to enforce it against any other party thereto." But to enforce payment the holder must have title to and possession of the bill. Therefore the English act provides that the indorsement "passes the property." Moreover, that is all it does provide. It does not provide that the holder may enforce it only until the infant avoids

¹ In England by the Infant's Relief Act, 37 and 38 Vict., Ch. 62 (1874), the common law rule is abrogated to the extent of making the contract of an infant absolutely void. But throughout the United States the common law rule that it is voidable merely prevails universally.

his act and reclaims the instrument. On that point, it is as silent as our act. Yet the critic would have us believe that under the English act the infant clearly may reclaim the instrument, but that our act is ambiguous on this point. Both acts provide exactly the same thing, and since it appears never to have been specifically decided whether an infant may reclaim a negotiable instrument that he has indorsed, both acts are precise codifications of existing law.

In the absence of authority on that point, the framers of the American and English acts did well to leave the question untouched. Whether they did so unintentionally or not is of small moment. Professor Ames is of opinion that the infant should be allowed to reclaim the instrument as against a holder with notice, but not as against a holder in due course.¹ Probably all would agree that the title of the holder in due course should be indefeasible. The importance of preserving the untrammelled negotiability of bills and notes leads some to conclude that even a holder with notice should be protected as against the infant. The point is that this question is within the province of a judge and not within the province of those engaged in *codifying* the law.

Section 23:

“When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.”

In a supplementary note, published subsequently to the articles in the Harvard Law Review, Professor Ames says that the need of amending Section 23 is shown by the case of *Tolman v. American National Bank*,² decided by the Supreme Court of Rhode Island in March, 1901.

An interesting line of cases is involved in the discussion of this section. Suppose A., falsely representing himself to be B., a citizen of X. town, goes to C. for a loan. C. makes inquiry concerning B., and finding him to be a prosperous and responsible merchant

¹ See also Ames' Cases on Bills and Notes, Vol. 2, title "Infancy," p. 840, and title "Transfer" (18) on p. 881.

² 48 Atl. R. 480.

of X. town, hands A. a check payable to the order of B., whom he supposes that A. is. A. indorses the check in B.'s name and A. or his indorsee has it cashed. The question then comes up between the bank and C. (the drawer) as to who shall bear the loss. This set of facts, with strikingly few variations, has been presented in numerous cases, all of them, prior to the case of *Tolman v. American National Bank*, holding that C. must bear the loss.¹

This result may be reached in several ways, none of which is without difficulty.

1. You may hold that A., albeit he is representing himself by a name falsely assumed for the purpose of deceiving C., is the real payee, the person to whom C. intended that the check should be paid. Under this view, any question as to C.'s negligence becomes immaterial. He must bear the loss, not because he has negligently trusted a stranger, but because the physical person who stood before him and with whom he dealt is the person whom he intended the bank should pay. The difficulty with this view is that although C. intended that the money should be paid to the person standing before him, it is equally true that he intended that it should be paid to B. of X. town.

2. You may hold that the drawer is liable because he has negligently trusted a stranger, but this view is unsatisfactory because none of the cases in point go on this ground, and because

¹ *U. S. v. Nat. Bank*, 45 Fed. R. 163; *Meyer v. Indiana Bank*, 61 N. E. Rep. 596; *Emporia Bank v. Shotwell*, 35 Kan. 360; *Robertson v. Coleman*, 141 Mass. 231; *First Bank v. American Bank*, 49 N. Y. App. Div. 349; *Merch. Bank v. Metropolitan Bank*, 7 Daly, 137; *Land Title and Trust Co. v. N. W. Bank*, 196 Pa. 230; *Metzger v. Franklin Bank*, 119 Ind. 359.

And see *Meridian Bank v. First Bank*, 7 Ind. App. 322; *Elliott v. Smitherman*, 2 Dev. & B. (N. C.) 338; *Forbes v. Espy*, 21 Ob. 474, in which, though the name adopted by the swindler appears to have been really fictitious, the loss is thrown on the drawer for the same reason as that which governed the former cases.

The same rule prevails as to the sale of chattels: *Edmunds v. Merch. Co.*, 135 Mass. 283; *Samuel v. Cheney*, 135 Mass. 278; *Dunbar v. Boston R. R. Co.*, 110 Mass. 26; *Alexander v. Swackhamer*, 105 Ind. 81.

A case interesting (though not quite in point) in connection with the rule here discussed is *Gravis v. The American Exchange Bank*, 17 N. Y. 205, which holds that if a check be made payable to one person and another person of precisely the same name or initials, so far as these are written out in the check, comes wrongfully or accidentally into possession of the same, indorses it, and obtains the money on it from the bank, still the bank is liable to make good the amount to the drawer. Possibly this carries the bank's liability to an excessive point. It would seem that the drawer, having represented that any man named John Smith is the payee, should be estopped to deny that the particular John Smith who indorsed the check and had it cashed is the payee.

the loss is thrown on C., even when he has admittedly exercised all reasonable diligence.

3. You may hold that the payee is fictitious, and that the check is therefore payable to bearer; but such an instrument is payable to bearer only when the drawer knows that the payee is fictitious. Moreover, if B., of X. town, is in existence and known to the drawer, such a view is clearly untenable.

4. You may hold that C. is estopped to deny that A., to whom he gave the check, is the real payee. But *estoppel* cannot operate unless the fact represented be known to and acted on by the bank, and where the swindler indorses the check to a *bona fide* holder who cashes it (and this is what happened in most of the cases) the bank knows nothing of the delivery to A. and does not rely on the drawer's representation that he is the payee.¹

As a matter of fact, the courts base their decision on the first ground, namely, that the bank has merely carried out the drawer's intent. Here and there an expression may be singled out which seems to countenance one or more of the other views, but a fair reading of the opinions shows that one idea dominates nearly all of them, namely, that the money has been paid to the person for whom it was really intended. The reasoning is briefly this: A man's name is the verbal designation by which he is known, but the man's visible presence affords a surer means of identification. C. was deceived as to the man he was dealing with, but he dealt with and intended to deal with the visible man who stood before him, identified by sight and hearing. Thinking that this man's name was B., he drew the check to B.'s order intending thereby to designate the person standing before him; so the bank has simply paid the money to the person for whom it was intended.

Such was undoubtedly the law prior to the act. By Section 23, when a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative

¹ However, in an interesting note to *Land Title and Trust Co. v. Bank*, 50 L. R. A. 83, the above objection to the estoppel theory is claimed to be invalid, the argument being: When the bank pays a check upon a forged indorsement it acts on the belief that the person who indorsed it was the person whom the drawer intended to designate as payee. This belief is largely — and when the person who presents the check is not identified — is solely induced by the fact that the check is, or was at the time of indorsement, in the impostor's possession. The drawer — by delivering the check to the impostor in the belief that he is the person named as payee — creates the appearance on which the bank acts.

except as against the person who "is precluded from setting up the forgery or want of authority." In the light of the cases above referred to, the meaning of this section, as applied to the point under discussion, seems reasonably clear. The drawer (C.) "is precluded from setting up the forgery or want of authority" and so the signature is not inoperative as to him and the law remains unchanged.

In 1899, Rhode Island adopted the Negotiable Instruments Law and in 1901 the case of *Tolman v. American National Bank* arose in that state.

In that case, one Louis Potter, representing himself to be Ernest A. Haskell, went to the plaintiff (Tolman) for a loan of money, giving the occupation and residence of Haskell as his own. The plaintiff made inquiry, and finding that Haskell was employed and was living as represented, gave Potter his check on the defendant bank payable to the order of Haskell. Potter indorsed Haskell's name and delivered the check to one A. R. Hines, who had it cashed at the bank. In an action by Tolman to compel the bank to credit him with the amount of the check, the court held that the bank must bear the loss.

As Professor Ames remarks, "the decision is a surprising one, both from the standpoint of common law principles, and of Section 23 of the act. All the reported cases on the point of fraudulent impersonation are against the decision. As a statutory question, but for this decision, the liability of the drawer would seem clear under the last clause of the section."

It is worth while to analyze the opinion of the court. It divides itself into three parts, and the reasoning of the learned Chief Justice Stiness may be summarized as follows:

1. When a bank receives money, it is to be paid out only as the depositor shall order. Therefore, if it pays on a forged indorsement, it bears the loss, unless the depositor is estopped by negligence from alleging the forgery. Therefore, *since Tolman intended that the money should be paid to the order of Haskell, and since Haskell has not indorsed the check, and since the plaintiff has not misled the defendant, the bank must bear the loss.*

2. The above reasoning represents what the law was "when, a few years ago, it seems to have been switched off on a fallacy in some places." To show that this formerly was the law, the learned judge cites three English and four American cases, not one

of which presents the point involved in *Tolman v. The Bank*. Coming, then, to the line of cases involving substantially the same facts as *Tolman v. The Bank*, in all of which the drawer was held liable, the learned judge says that these are based on a manifest fallacy and ignore the distinction between fictitious and real payees.

3. Section 23 brings the law back to where it was before it was "switched off on a fallacy." An application of this section to the case at bar shows this. The signature here is clearly one "made without the authority of the person whose signature it purports to be." Therefore, it is wholly inoperative except as against a person who "is precluded from setting up the want of authority." But Tolman is not precluded, for he has been guilty of no conduct which misled the bank and so is not estopped from showing that the bank did not pay as directed. Judgment for Plaintiff.

Three observations may be made on this opinion :

1. In stating what the law was before it was "switched off on a fallacy" the learned judge is really stating what in his opinion the law should have been. There is no case in point to sustain him. Prior to the cases against his view, there are no cases in point at all.

2. As to "the manifest fallacy" in which the uniform current of authority has its source, the learned judge says that it is caused by ignoring the distinction between real and fictitious payees — that in the latter case, there can be no one in the mind of the drawer other than the person with whom he is dealing — but that "*in the case of a real person, one party having him in mind satisfies himself about the responsibility of such party and supposes that he is dealing not with the person who is in fact before him, but with the one whom he has in mind.*" But the numerous cases which oppose the learned judge go on the ground that *the real person whom the drawer has in mind is the man standing before him*. True, this ignores the fact that the drawer supposed him to be B., of X. town, but the other view ignores an equally important fact, *i. e.* that he intended to deal with and lend the money to the person standing before him. One view is about as satisfactory as the other in interpreting the drawer's real intention. Moreover, the view which holds the drawer liable, in case B., of X. town, does not exist, even though the drawer made all reasonable inquiry and was deceived into believing that he did exist, but protects

him in case B., of X. town, is in existence, makes a distinction which does nothing to increase the actual justice meted out.

3. When a *code* is, as here, entirely in accord with a settled rule of law, what justification is there for holding that it meant to upset that rule and establish one which never was the law?

Judge Brewster replies, "The exact point in *Tolman v. Bank* was simply this: was it 'precluding' negligence for Tolman to trust the stranger Potter, with no further inquiry than that stated in the opinion? On this precise point as to a 'stranger payee' there are but two exact precedents.¹ The first is *National Bank v. Nolting*.² This case holds the bank liable, saying, 'To hold that giving a check to a stranger . . . was sufficient . . . evidence to excuse the bank . . . would be to relieve the bank from a just responsibility.' The second case is *Smith v. Mech. Bank*.³ This case, by a divided court, held the bank not liable."

Of this defence, it may be observed first, while the lack of negligence may have been the ground on which the decision in *Tolman v. Bank* was based, it was not, according to all the cases in point, the question really involved. The well-settled rule applicable to these facts renders the question of negligence wholly immaterial because it declares that Potter was the real payee. Admit that he is not the payee, then the drawer is liable only in case he is estopped. But the latter view has never been the law. Thus it is that in the numerous cases which are exact precedents on this point, though the degree of care exercised by the drawer differs, the decisions are the same, for the very reason that they proceed on a ground which renders negligence immaterial.

Second, the two cases cited by Judge Brewster are not precedents at all. *National Bank v. Nolting* was a case of the *alteration* of a check, and the point decided was that the check, having been properly drawn, the mere fact that it was delivered to a stranger did not estop the drawer from showing that it had been raised from ten dollars to five hundred dollars. *Smith v. Mech. Bank* comes somewhere nearer being in point, though it differs from *Tolman v. The Bank* in at least one vital particular. In the former case, the swindler did not represent himself to be P. & W., the firm in whose favor the check was drawn. It was made payable to P. & W., who were known to the drawer, for the very

¹ 5 Amer. and Eng. Ency. of Law, Second Edition, 1066.

² 94 Va. 263.

³ 6 La. Ann. 610.

purpose of compelling the stranger concerning whom the drawer realized that he knew nothing, to go to P. & W. and get their indorsement. Of course, then, when the stranger forged their signature, the drawer could not be held liable on the ground that the stranger was the man to whom he intended to make the check payable.

Judge Brewster further remarks, "The theory of the Dean as to the drawer's expectation that the 'physical person before him' would indorse the note had already been shown to be a fallacy." Where and by whom? Not in any of the cases in which the question was raised and not in the two articles which Judge Brewster cites as bearing out his assertion.¹

It is perfectly evident, then — and indeed this is Professor Ames' position — that the trouble is not with Section 23, but with the case of *Tolman v. The Bank*. Undoubtedly it is unfortunate that the only judicial interpretation that this section has received should serve only to throw doubt on what was previously well settled.² But the blame does not belong to the Negotiable Instruments Law. Section 23 — copied from the English act — was, at the time of its adoption, an accurate statement of existing law, and in view of the unanimity that exists among the cases on which it is based, the doubts raised by *Tolman v. The Bank* will probably soon be dispelled and this section will be interpreted as having merely affirmed a well-settled rule.

Section 29:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, *without receiving value therefor*, and for the purpose of lending his

¹ The admirable little article on "Loss by Check Delivered to Impostor," Case and Comment, Vol. I, No. 7, December, 1900, p. 75, cites no authorities, and although ably stating the difficulty of the "intention" theory, *i. e.*, that "The imposture makes it impossible that both parts of his intent can be carried out," admits that most courts have adopted this view. Moreover, though agreeing with the result of the decisions, it advances no more satisfactory ground on which to base it, the estoppel theory being as open to objection as the intention theory. As for Judge Brewster's negligence theory, the article disposes of that in convincing fashion.

To the same effect is the note in 50 L. R. A. 83. Moreover, both of these articles agree that the *drawer* should bear the loss.

² It is not denied that much might be said in favor of the result reached in *Tolman v. The Bank*, did the question arise *de novo*. The point is that when once so difficult and doubtful a point is clearly settled, mischief and not good results from reopening the matter and involving it in doubt. As matters stand to-day, no lawyer could advise a client, with any certainty, on this point.

name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.”¹

The criticism is, “By this definition, one who has received a commission, which is certainly value, for lending the credit of his name, would not be an accommodation party. But no business man or good lawyer would sanction such a distinction. . . . To take a concrete case. A. offers B. ten dollars if he, B., will sign a note of \$1,000 for A.’s accommodation. B. accepts the ten dollars and signs the note. Can anyone seriously doubt that B. is an accommodation party? If he is, the definition in this section is erroneous.”

Judge Brewster’s answer is that the definition of an accommodation party given in Section 29 is the same as the definition given by “all the cases, all the text writers, and all the encyclopedias,² the law dictionaries, and the ordinary English lexicons. . . . The only reason given for the overthrow of all these authorities is an illustration intended apparently to demonstrate the difficulty of showing what is value and what is not, but which in reality indicates value on its face.”

Professor Ames replies that Judge Brewster’s answer only shows “that he and his colleagues erred in good company.”

The last sentence quoted above from Judge Brewster leaves something to be desired from the standpoint of clearness, but apparently the judge thinks that under Section 29 B. (in the case supposed) is not an accommodation party.³ A moment’s reflection shows the error of this. B. ought to be regarded as an accommodation party. Though doubtless partially induced by the ten dollars to sign his name, his real purpose in signing (however that purpose may have been induced) was to lend credit to A. B. received nothing *for the note*. He did not become a holder for value of it. On the contrary, what he did receive came from

¹ This is a copy of Section 29 of the English Act.

² Judge Brewster refers to Amer. and Eng. Ency. of Law, Vol. I, pp. 335-36; 1 Daniel, 189; Tiedeman, Sec. 158; Byles on Bills, star p. 131; 2 Randolph, 472; Norton’s Horn-Book (1900), 176; Bigelow, Second Edition, cites the definition given by the Negotiable Instruments Law as the true definition; Standard and Webster Lexicons.

³ Mr. John L. Farrell also thinks that B. is not an accommodation party. See article in Brief of Phi Delta Phi, Vol. III, No. 20, Quarter (1901). But Mr. Farrell, like Judge Brewster, ignores the meaning of the word “therefor.”

his *transferor* (assuming that B. ever became the holder of the note at all) and the note was negotiated solely for A.'s benefit, who received the consideration paid for it. Moreover, B. is an accommodation party under Section 29. Mr. Cohen hits the nail squarely in stating the meaning of this section. "Without receiving any value therefor" means without receiving any value for the bill, and not *without receiving any consideration for lending his name.*" Thus B. is an accommodation party because he has received no value for the instrument, though he did receive ten dollars for signing his name to it.

Probably no harm would have resulted had the Commission adopted Professor Ames' suggestion and omitted the words "without receiving value therefor and," but since their insertion requires merely that proper care be exercised in interpreting the word "therefor," no difficulty need be anticipated on this point. It may be added that the same words used in the English act have proved entirely satisfactory.

Section 34:

"A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

"This," says Professor Ames, "is an inadequate definition" because "it is nowhere stated that an indorsement, like the drawing of a bill, is an order. If the payee writes 'I assign this note to B.,' or 'I guarantee to B. the payment of this note,' is he liable as indorser on his assignment or guarantee? Is his transferee an indorsee, and therefore within the rule that gives a holder in due course title free from equitable defences? There are numerous but conflicting decisions on these points,¹ and it is unfor-

¹ "In ten states a payee who transfers a note by writing on the back, 'I assign this note to X.,' assumes the liability of an ordinary indorser. In six states such an assignor is not an indorser. In thirteen states the assignee, like an indorser, acquires title free from equities good against the assignor. In two states the assignee takes subject to such equities.

"In three states a payee who transfers a note by writing on the back, 'I guarantee the payment of this note to X.,' is liable as an indorser. In ten states he is not so liable. In thirteen states the transferee, like an indorsee, acquires a title free from equities good against the transferor. In three states and in the Supreme Court of the United States, the transferee takes subject to such equities."

fortunate that the new code does not secure uniformity here as it does in the matter of notes payable with exchange or attorneys' fees."

Judge Brewster answers that "The liability of a party on a peculiar indorsement, which is outside of negotiability, must be settled by a court."

But, as Professor Ames replies, "The very point in controversy is one of negotiability." Some states hold that language such as that referred to above amounts to an indorsement — others hold that it does not — Professor Ames' point is that the code should have settled this disputed question as to negotiability and that it could have done so by stating in Section 34 that an indorsement, like the drawing of a bill, is an order.

Undoubtedly much would be gained by deciding once for all as to what expressions constitute an indorsement. But the question cannot be settled by enacting that an indorsement is an order. No one ever denied that an indorsement is, among other things, a direction to the maker or acceptor to pay the amount of the instrument to the indorsee, but some states hold that the words "I assign this note to B." amount to such a direction, while others hold that they do not. This is where the courts differ. Therefore, Professor Ames has merely shown that here is a disputed question left unanswered, without showing how it could have been answered by any provision sufficiently brief and accurate and comprehensive to be inserted in a code.

Section 36:

"An indorsement is restrictive, which either (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person."

Professor Ames says, "Since the so-called 'agent of the indorser' has, under Section 37, the right to sue in his own name on the instrument, but for the benefit of the indorser, he is in truth a trustee, and not a mere agent. The Subsection 2 and 3 should therefore be consolidated as follows: 'An indorsement is restrictive which vests the title in the indorsee in trust for the indorser or some third person.'"

Judge Brewster replies that although all agents are trustees in the sense that they are ultimately accountable to the principal, all agents are not technically trustees, and that the distinction between an agent and a trustee is embodied in Section 36 to relieve the plaintiff from proving an actual trust.

Of course the criticism of this subsection deals simply with its form. Professor Ames does not mean that any difficulty can possibly arise under the language as it stands. He means merely that the substitute he offers is somewhat shorter than the act and more technically correct. When A. indorses a note "Pay to B. for the use of C.," B. has always been termed a *trustee*, as of course he is. When A. indorses a note "Pay to B. for my use" or indorses "for collection" to B., B. has always been termed an *agent*. Professor Ames' point is that "agent" is no longer a correct word to use in describing B. in the latter case, *because* he can now, under Section 37, sue *in his own name* on the instrument, though for the benefit of the indorser. Thus Section 37 vests the legal title in the indorsee, and therefore, says the critic, he is in truth a trustee.

Possibly — though nevertheless it is not clear that the suggested change could have been made without the risk of some misunderstanding. An indorsement for collection has always been regarded as creating a mere agency. Title remains in the indorser, who may terminate the agency at any time before collection and reclaim the instrument. In most states, prior to the act, the agent, not having title, could not sue in his own name. In some, however, he could¹ — the indorsement being deemed to have conferred this authority — but the latter states, though deeming the agent to have received the legal title to an extent sufficient to enable him to sue in his own name, still speak of him and regard him as an *agent* whose authority may be revoked at any time. It is extremely unlikely that Section 37 intended to accomplish anything more than a procedural change. The indorsee for collection was to be allowed to sue in his own name; it was not intended to make any further change in his rights and duties — not intended to alter in any way the legal conception of the relationship that exists between him and his indorser. Was it not, therefore, the wise and safe course to retain the words whose meaning, long use, and repeated construction have rendered unmistakable? Why introduce a word which has never been used to describe an indorsee for collection even by courts which conferred on him the right to sue in his own name?²

¹ *Wilson v. Tolson*, 79 Ga. 137; *Boyd v. Corbitt*, 37 Mich. 52; *Moore v. Hall*, 48 Mich. 143.

² It may be added that by Section 35 of the English Bills of Exchange Act, a restrictive indorsement, although it confers on the indorsee the right to sue in his own

Section 37: . . .

This section confers upon the indorsee under a restrictive indorsement the right to bring any action that the indorser can bring.¹ "Inferentially," says Professor Ames, "such an indorsee cannot sue his indorser. This is just, if the instrument was transferred to the indorsee for the benefit of the indorser. But unjust, if the indorsement was for value to the indorsee in trust for a third person." For instance, "A., the holder of a note payable to his order, sells it to B. and is about to indorse it to him, but, at B.'s request, indorses it to X. in trust for B., instead of to B. directly. At maturity of the note, the maker is insolvent, but A. is solvent. By this section, X., the indorser, may sue anyone that his indorser can sue. In other words, he may sue the insolvent maker, but he cannot sue the solvent indorser, A."

The ground upon which Judge Brewster finally rests his defence of this section is "the fact that no trouble has arisen under it in England sufficiently indicates that the immunity the Dean claims for the solvent indorser 'A.' does not exist. Equity would take care of that."

It is too plain for discussion that X., in the case supposed, should have a right of action on the note against the solvent indorser A. How "equity would take care of that" does not appear. Unless X. has his action under a proper construction of this section it is difficult to see how equity could mend matters.

Mr. Farrell makes a useful contribution on this point. He says, "The language of Section 37 is used in a permissive and not in a restrictive sense. Section 36 defines a restrictive indorsement, which limits and circumscribes the utility of the instrument so indorsed as compared with paper which does not bear this qualified indorsement. The following section (37) states the effect of such an indorsement, and the rights of the indorsee, notwithstanding the restrictive feature, and says that it '*confers* the right to bring any action that the indorser can bring.' That does not imply that he could bring no action other than that which his transferor might have brought, and the phraseology of the open-

name, is, nevertheless, regarded as a mere authority to deal with the bill and not as a transfer of the ownership thereof.

¹ Section 37: "A restrictive indorsement confers upon the indorsee the right, (1) To receive payment of the instrument; (2) To bring any action thereon that the indorser could bring."

ing clause shows that the framers undoubtedly had this in mind when drafting the section.”¹

This argument — while not wholly convincing — makes out the best case that can be presented in defence of the act on this point. Undoubtedly this section could be improved upon, but since it would be gross injustice to refuse X. the right to sue A. and since the real purpose of subsection 37, par. 2, was simply to permit an indorsee under a restrictive indorsement to sue in his own name, the reasoning suggested by Mr. Farrell is sufficient to enable the courts to reach a just result.

Section 40: . . .

Professor Ames criticises Section 40 as being repugnant to Section 9-5. A discussion of this criticism and of Judge Brewster's reply thereto will be found *supra*, pages 123 to 130 inclusive.

Section 49:

“Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.”

Professor Ames criticises the first sentence of this section. He agrees that if an indorsement was intended, but omitted through inadvertence, it is obviously just that the transferor should be required to indorse subsequently. But he says that if the omission to indorse was intentional, it is as obviously unjust to compel the transferor to assume the liability of an indorser.

The obvious answer is that the transferor may indorse “without recourse” whenever such an indorsement will carry out the intention of the parties. But Professor Ames thinks that this section does not permit of a qualified indorsement in any case. “In Section 44,” he says, “it is provided that any person under obligation to indorse in a representative capacity may indorse in such terms as to negative personal liability. But there is no simi-

¹ Article on the Negotiable Instruments Law by John L. Farrell, Brief of Phi Delta Phi, Vol. III. No. 2, First Quarter (1901).

lar provision for a qualified indorsement in Section 49. Such a provision should be added to this section." The critic's reasoning does not convince. It certainly does not follow that Section 49 requires an unqualified indorsement in every case, simply because Section 44 provides that one under obligation to indorse in a representative capacity may use terms which negative personal liability. Section 49 does not specify any one kind of indorsement. In every case the transferee must go into a court of equity to compel an indorsement. Obviously he will be given the kind of an indorsement to which he is entitled. If the parties agreed that the transferor was not to assume personal liability, an indorsement "without recourse" gives the transferee all that he is entitled to by common sense, by equity or by Section 49.¹

Professor Ames makes a further objection to this section. "If the transferee by delivery merely of an instrument payable to the order of the transferor always acquires only the rights of the latter, such a transferee of a note made for the accommodation of the payee could not enforce it against the maker, even though he might have given to the payee the money which it was the object of the maker to procure for the payee on the credit of his own name. Such a result would be a reproach to the law, even if due to the action of the courts. But this section, so far from codifying, actually nullifies the judicial precedents in this country."²

¹ The Colorado Legislature added to the sentence requiring an indorsement the words "if omitted by accident or mistake," but for the reason given above the addition was unnecessary, and Judge Brewster refers to Mr. J. Warner Mills, page 23, the annotator of the Colorado act, who says, in speaking of the two forms of expression, "But either form of expression establishes the equitable rule of law."

² Of the four American cases cited by Professor Ames, only one can be regarded as supporting his position, viz., *Hughes v. Nelson*, 39 N. J. Eq. 547. (For a convincing argument which expressly disapproves of that case and cites numerous authorities the other way, see *Goshen National Bank v. Bingham*, 23 N. E. Rep. 181.)

In *Matthias v. Kirsch*, 87 Me. 523, the accommodation note in suit, which was unindorsed by the payee, had been given in renewal of a prior note which had been properly indorsed. It was held that the rights of the parties were established by the first note. The plaintiff could have enforced the first note and, having taken the second merely as a renewal of the first, should be allowed to recover. The court expressly based its decision on this ground, stating that but for the transaction previous to the giving of the note in suit, the defendant would have prevailed on the well-settled rule that the delivery of a note before maturity without the indorsement of the payee is a mere assignment and carries with it only the rights of the assignor.

Meggett v. Baum, 57 Miss. 22, went entirely on a Mississippi statute, on reasoning which is not applicable in other states.

Freund v. National Bank, 76 N. Y. 352, is a poor case with which to sustain any proposition. The court mistook the point and then reasoned incorrectly on what it

Judge Brewster makes no reply to this criticism.

Let us see. A. makes his note for \$1,000 payable "to the order of B." for B.'s accommodation. B. transfers it by delivery, without indorsement, to C. for value. Under Section 49, C. may go

supposed to be the point. The plaintiff drew his check on the defendant bank payable to O. for the latter's accommodation. O. transferred it unindorsed to B. for value. Then B. took it to the defendant bank and had it certified. Later the bank paid the check and the plaintiff (drawer), who, prior to the payment but after the certification, had notified the bank to stop payment of the check, sought to compel the bank to credit him with the amount of it. Judgment for defendant. The opinion first established at some length that B. was an assignee *who succeeded merely to the payee's rights*. Then it reasoned that *since B. could have enforced the check against the drawer*, the bank was justified in paying him or in certifying at his instance.

Two later New York cases (*Goshen National Bank v. Bingham*, 23 N. E. Rep. 181, and *Lynch v. First National Bank*, 13 N. E. Rep. 775) based the decision in the Freund case solely on the ground that the bank certified the check *while it was in the hands of B., the transferee by delivery of the payee*—that under these circumstances the bank took, as it had a right to take, the risk of the title which the holder claimed to have acquired from the payee, and entered into a contract with the holder by which it accepted the check and promised to pay the amount of it to the holder, notwithstanding the lack of indorsement.

The precise point involved in the Freund case was this: Is a bank justified in paying a check to one who is merely the transferee by delivery of the payee? If that question be answered in the affirmative, the bank wins regardless of whether the check was an accommodation one or not. If that question be answered in the negative, the drawer wins. Why? Once admit that payment to the payee's transferee by mere delivery is within the scope of the drawer's order, then the bank is justified in paying the transferee whenever it would be justified in paying the payee. But it is justified in paying the payee regardless of whether the latter gave value for the check or not. Therefore the question of accommodation was wholly immaterial in the Freund case. Still more immaterial, if possible, was the question which arose out of the fact that the payee was an accommodated party, viz., the question whether the transferee by mere delivery had a right of action against the drawer. The question was as to the implied contract that exists between the drawer and the bank. If that contract permits the bank to cash checks only for the payee or his indorsee, then any payment made to the payee's transferee by mere delivery violates the drawer's order. Otherwise, if the contract allows a payment to the payee, or to his transferee by delivery or to his indorsee. (Of course, a bank may certify a check and debit the drawer with the amount of it when and only when it would be justified in cashing the check.) The Freund case decided that the defendant bank would have been justified in paying the check to the payee's transferee by delivery. It follows that it was justified in certifying it at his instance.

It is submitted that the decision is wrong for the reason that if the check should be given to the payee in payment of a debt, the drawer, if sued by the payee on the original consideration, might find it difficult, if not impossible, to prove that the debt had been paid. He must prove that B. (who had the check cashed) was the payee's assignee. But there is no written evidence of that. A check should be regarded as authorizing the bank to pay only to the *payee or his indorsee*. Moreover, this view accords with banking practice, which does not sustain the proposition laid down (though apparently unconsciously) by the Freund case.

into equity, compel B. to indorse, and may then recover against the maker. But until C. gets B.'s indorsement, he is merely B.'s assignee and so cannot recover against the maker. This, says Professor Ames, is a "reproach to the law."

It would not be, if A., induced by B.'s fraud, had executed the note for a valuable consideration. In such a case all would sanction the application of the well-settled rule that the transfer by delivery without indorsement of a note payable to order operates as a mere assignment which vests in the assignee (C.) whatever rights his assignor (B.) had. But as against B., the maker has the defence of fraud, so C. cannot recover. Why should there be a difference between the defence of "fraud" and the defence of "accommodation"?

Professor Ames' reason is that A. gave the note to B. to enable the latter to raise money on it. He lent his credit for that purpose. And since B. has in fact raised money on the note by using A.'s credit, A. should not be allowed to escape liability to C. That is an argument *ad hominem*. It does not contain any legal reason for holding A. liable. Of course, he meant to lend B. his credit. But he lent it to him by executing a promissory note in which he promised to pay "to the order of B." Those words have a very definite legal meaning, viz., to pay to B. or to one who holds under his indorsement. That is A.'s promise. What reason is there for saying that he intended to assume a broader liability? By what legal principle can he be held liable on any promise other than the one he has made? Why should the law be "reproached" for insisting that those who seek to avail themselves of the unusual and extraordinary protection extended to commercial paper must comply with the rules which govern commercial paper — rules universally understood and which are merely a statement of those everyday business customs which really created and govern this branch of the law? It is a fundamental and an almost universal rule of law that no one can transfer a better title than he possesses. An exception exists in favor of those who become the holders in due course of commercial paper. The proper method of becoming a holder in due course is very simple, and little authority and still less reason can be presented for protecting those who through design, carelessness or ignorance seek to dispense with that method.¹

¹ Section 49 is copied from Section 31, par. 4, of the English act. See Chalmers' Bills of Exch., Fifth ed., pp. 103 to 105.

Section 64:

"When a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

Prior to the act, no part of the law of Bills and Notes was more difficult and confused than the rules regulating the liability of the anomalous indorser. This kindly individual was held liable in various states as first indorser, second indorser, joint maker, and guarantor. Even then his liability was in most cases merely "presumed," and the question, in what cases and by what evidence could the presumption be rebutted, gave rise to various answers. All agree that Section 64, which deals with this question, is a long step forward. It unifies the law and lays down rules admirably framed to carry out the intention of the parties.

Professor Ames fully appreciates the excellence of this section, but thinks that it might be improved in one particular. He says, "Section 64 is an excellent piece of codification but for one slip. One not otherwise a party to a bill payable to the order of the drawer may sign it for the accommodation of the acceptor, as in *Matthews v. Bloxsome*.¹ He should clearly be liable to the drawer-payee. But by Subsection 2 he is liable only to parties subsequent to the drawer."

To illustrate: X. is willing to sell goods to A. on credit provided B. becomes surety for A. So A. makes his note payable to X., gets B. to indorse it, and delivers it to X. in exchange for the goods. By Subsection 1, B., the surety, is liable to X. This is the correct result and the one intended by the parties. Suppose, however, that they attempt to accomplish it in a different way. Suppose X. draws on A. payable to his own order, A. accepts, gets B. to indorse, and hands the bill back to X. X. sells it to Y. It is dishonored at maturity and X. is compelled to take it up. X. now has no right over against B. All intended that B. should be-

¹ 33 L. J. Q. B. 209. For a similar case see *Young v. Glover*, 3 Jurist, N. S. 637.

come liable to X., yet, the bill being payable to the order of the drawer, Subsection 2 makes B., the anomalous indorser, liable not to the drawer-payee, but only to parties subsequent to the drawer-payee. Professor Ames' point is that Section 64 should be amended so as to render B. liable to X. in the latter case.¹

Judge Brewster misapprehends Professor Ames' meaning on this point. He regards the critic as saying that the anomalous indorser should be liable to the *maker or drawer whom he has accommodated with his signature*, in cases where the maker or drawer is the payee. But Professor Ames does not say that. The case he speaks of and the hypothetical case he puts forward is a case in which the *acceptor* is accommodated by the anomalous indorser. Where the drawer-payee is the accommodated party, Professor Ames agrees with Subsection 3, which renders the anomalous indorser in such case liable only to parties subsequent to the drawer-payee. To this misapprehension of the critic's meaning must be attributed Judge Brewster's statement that "The Dean's proposed substitute would defeat the purpose of the act." It would not. The proposed substitute would leave the act precisely as it is, except that an anomalous indorser who signed *for the accommodation of the acceptor*, a bill payable to the drawer's order, would be liable to the drawer-payee.²

In another place Judge Brewster says that by Section 64 the anomalous indorser is to be liable *to all subsequent parties*. This is the answer to Professor Ames, if any there be. Of course, the only liability that the regular indorser assumes is to subsequent parties. That is the contract created by the law merchant. But

¹ Professor Ames proposes to meet the difficulty by making the first two sections of Section 64 read as follows :

1. "If the instrument is a note or bill payable to the order of a third person, or an accepted bill payable to the order of the drawer, he is liable to the payee and to all subsequent parties."

2. "If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or payable to bearer, he is liable to all parties subsequent to the maker or drawer."

² In his second paper, Judge Brewster remarks, "As the Dean's definition of accommodation paper includes paper for value received, his new illustration has no meaning if the illustration makes 'B.' an accommodation indorser." A remarkable sentence. All anomalous indorsers are accommodation parties in the sense that they sign for the purpose of lending their credit. But very few accommodation indorsers are anomalous indorsers. And these are anomalous indorsers not because they received no value, but because they signed before delivery instruments to which they were not otherwise parties. Therefore, whether or not "B." in the case supposed received value is absolutely immaterial.

one, not otherwise a party to an instrument, who puts his signature thereon before delivery, is not a regular indorser. His position is anomalous. So far, therefore, as any technical rule goes, he could be held to the liability of a first indorser, second indorser, joint maker, or guarantor. Section 64 attempts, and with much success, to fasten on him the liability which he intended to assume. In one case, however, namely, where he signs, for the accommodation of the acceptor, a bill payable to the order of the drawer, the section makes his liability less than he intended. Professor Ames' substitute would remedy this defect without making any other change. It would seem, therefore, that admirable as Section 64 now is, Professor Ames' substitute would have been even better.

Sections 65 and 66:

"Sec. 65. Every person negotiating an instrument by delivery or by a qualified indorsement, *warrants*,

"1. That the instrument is genuine and in all respects what it purports to be:

"2. That he has a good title to it;

"3. That all prior parties had capacity to contract;

"4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

"But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

"The provisions of Subdivision 3 of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

"Sec. 66. Every indorser who indorses without qualification, *warrants to all subsequent holders in due course*:

"1. The matters and things mentioned in Subdivisions 1, 2, and 3 of the next preceding section; and

"2. That the instrument is, at the time of his indorsement, valid and subsisting.

"And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

Sections 65 and 66, which deal with the so-called "warranties" of one who negotiates a bill or note, can best be considered together.

Early English cases established that one sued as acceptor, drawer or indorser upon a bill or note was "precluded" from denying to a holder in due course certain things. The acceptor was precluded from denying the existence of the drawer, the genuineness of his signature, his capacity and authority to draw the bill,¹ and the existence of the payee and his then capacity to indorse.² The drawer was precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.³ Similarly the indorser was precluded from denying the genuineness and regularity in all respects of the drawer's signature and all previous indorsements,⁴ nor could he deny that the instrument was, at the time of his indorsement, a valid and subsisting bill, to which he then had a good title.⁵

These cases preclude him on the ground that by drawing, accepting or indorsing, he admits certain facts which he is afterwards estopped to deny. Nothing is said in these cases about "warranties." None of them place the indorser's liability on the ground that he has made a collateral agreement warranting, for instance, the genuineness of the drawer's signature. Of course, under the view adopted in these cases, the estoppel works for the benefit not merely of the immediate indorsee, but for all subsequent holders in due course.

The provisions of the English Bills of Exchange Act accord with this view. By Section 54, par. 2, the acceptor "is precluded from denying to a holder in due course," etc. Section 55 "precludes" the drawer. Section 55, par. 2, "precludes" the indorser. On the other hand, by Section 58, one who negotiates by mere delivery a bill payable to bearer, while of course not liable on the instrument, is in the position of the vendor of a chattel and "warrants" to his immediate transferee, being the holder for value, that the bill is what it purports to be, that he has a right to

¹ *Cooper v. Meyer*, 10 B. & C. 468, 1830; *Sanderson v. Collman*, 4 M. & Gr. 209, 1842.

² *Drayton v. Dale*, 2 B. & C. 293, 1823.

³ *Collis v. Emett*, 1 H. Bl. 313, 1790; *Phillips v. Im Thurn*, 18 C. B. N. s. 694, 1865.

⁴ *Ex parte Clarke*, 3 Brown, C. R. 238, 1791; *Thicknesse v. Bromilow*, 2 Gr. & J. 425, 1832; *McGregor v. Rhodes*, 6 E. & B. 266, 1856.

⁵ *Burchfield v. Moore*, 23 L. J. Q. B. 261, 1854.

transfer it, and that he knows no fact which renders it valueless. And these warranties, like the warranties of the vendor of a chattel, extend only to the immediate transferee, and can be extended to a subsequent holder only by an express assignment by that transferee.

Turning now to the American act, we find that it follows the English act in regard to the incidents of the contracts of the drawer and acceptor. By Section 61, the drawer by drawing the instrument "*admits* the existence of the payee and his then capacity to indorse." By Section 62, an acceptor "*admits*" the existence of the drawer, the genuineness of his signature, his capacity and authority to draw the instrument, and the existence of the payee and his then capacity to indorse.

But coming to the *indorser*, we find that by Sections 65 and 66 he "*warrants*" to all subsequent holders in due course the matters and things enumerated in these sections. The use of the word "Warranty" in this connection did not start with the Negotiable Instruments Law. For some years past the American courts have said that an indorsement is a warranty of the genuineness of the instrument's existence and capacity of prior parties, etc. The word has been loosely used and often interchangeably with such expressions as "precludes the indorser from denying" — "estops the indorser to deny" — or, "is an admission,"¹ though in some respects the courts have regarded it as a strict legal warranty and have held, for instance, that since the warranty is broken, if at all, at the time of transfer, the warrantor may be sued immediately, before maturity, and without presentment or notice.²

Nor can it be doubted that Sections 65 and 66 of the American act use the word "warrants" in its proper legal sense. "The

¹ "Obviously this is not a necessary result of the indorser's conditional undertaking to pay; and, in the absence of plain public policy calling for it, the existence of such a warranty, taking the word in its ordinary sense, should depend upon the custom. The judicial dicta (and generally the language of the courts in the matter is nothing more) have, however, become so common as to create the belief that warranty is an incident of indorsement. And the statute at last has confirmed the belief and turned a number of loose and unnecessary dicta into law, while at the same time it follows the custom in regard to the incidents of the contracts of the drawer and of the acceptor, treating *their* acts as admissions merely." Bigelow on the Law of Bills, Notes and Checks, 2d Edition, p. 99.

² *Turnbull v. Bowyer*, 40 N. Y. 456, 1859; *Warren-Scharf Co. v. Com. Bank*, 97 Fed. R. 181, 1899; *Copp v. McDougall*, 9 Mass. 1, 1812; *Blethen v. Lovering*, 58 Me. 437, 1870.

fact that the American statute departs, at this point, from the English statute, on which it is based, which indeed it generally follows *ipsissimis verbis*, and that it makes a distinction in terms between the incidents of indorsement and those of drawing and accepting, leads to the inference that the word ('warrants') is used in its primary sense. Something certainly is meant beyond indorsement according to the legal import of that act, for the indorser 'warrants' and in *addition* he 'engages,' etc.¹

Now for the criticism. It will be observed by Section 66 that the indorser without qualification "warrants to all subsequent holders in due course." Professor Ames, while evidently concurring in the use of the word "warranty," says that to extend it to all subsequent holders in due course is a misconception of the nature of a warranty. His position is: — An indorsement is (1) a transfer of title, (2) a contract to pay the instrument in case of dishonor. The warranty has no connection with the indorser's liability on his contract of indorsement. Like the warranty of the vendor of a chattel, it is a mere incident of the transfer of title. Moreover, the warranty is a collateral agreement, quite extrinsic to the instrument. Plainly, then, the indorser's liability for a breach of warranty *extends only to his immediate indorsee as a vendee*.

Theory aside for a moment, it is certain that had the act limited the so-called "warranties" to the immediate indorsee, it would have changed the law. These rules were based originally upon the doctrine of estoppel; yet, whatever be their true explanation, it seems never to have been denied that one who indorses a bill without qualification cannot, as against any subsequent holder in due course, plead, for instance, that the drawer was without capacity to contract. Even those who speak of the incidents of the indorser's contract as "warranties" hold this view. So that in extending this protection to all subsequent holders in due course, the act has merely *codified* that which has long been the law. As to the theory of the criticism — there can be little doubt that the "warranties" of the indorser (for such they are under the act) are incidents of the *transfer* of the instrument and not of the contract of indorsement. But of course, like other choses in action, they are assignable, and there is no serious difficulty in saying that they require no express assignment, but are assigned by the indorse-

¹ Bigelow on the Law of Bills, Notes and Checks, 2d Edition, p. 99.

ment of the instrument. Of course, it will be asked, why should an indorsement be considered as the assignment of a collateral contract, which is an incident, not of the contract of indorsement, but of the transfer of the instrument? The answer must be that such an interpretation of the indorsement best carries out the intention of the parties and preserves or tends to preserve the untrammelled negotiability of the instrument by affording this protection to the holder in due course. It is further to be observed that in one sense these warranties do arise from the contract of indorsement. As Mr. Norton points out,¹ upon the strict analogy of the sale of other personal property, it would follow that the implied "warranty" of the indorser would be confined to a warranty of title. But the indorser also warrants that the instrument is genuine and that the drawer had capacity to contract. The real reason for this is that he may not set up facts which are wholly inconsistent with his promise of indemnity.

So we see that thus far the results reached by Section 66 are just, and are based on sound business sense. The only difficulty is that we are now obliged to explain as a "warranty" that which arose as an estoppel. Yet the difficulty is not insuperable if we regard them as choses in action, extrinsic to the instrument, but peculiar only in this, that they require no express assignment, but are assigned by the indorsement of the instrument.

This prepares us for the next criticism. Turning back to Section 65, we find that a warranty of the transferrer by delivery inures only to the benefit of his immediate transferee, whereas the similar warranty of the indorser "without recourse" runs in favor of all subsequent holders. The critic says that the idea that the indorser "without recourse" is liable to any but his immediate transferee is an original invention of the Negotiable Instruments Law.² "To say that such an indorser is liable in any manner on the bill is to contradict the plain language of his indorsement. His liability is extrinsic to the bill. As the vendor of the bill, he, like the vendor of other personal property, is liable to his vendee,

¹ Norton on Bills and Notes, 3d Edition, 163.

² Judge Brewster answers this by showing that the view adopted by the act was asserted by Professor Ames some twenty years ago. "An indorsement without recourse, like a transfer by delivery merely, being, in substance, a sale, the indorser is responsible to the indorsee and subsequent holders for the validity of the title and the genuineness of the instrument which he purports to sell." 11 Ames' Cases on Bills and Notes, p. 840. The Dean smilingly replies that that was a youthful indiscretion committed in his callow days.

but to no subsequent purchaser, for the genuineness and title of the thing sold.”¹

Of course, under the English view, the indorser without recourse would not be liable to subsequent holders, because, not being able to sue him on his indorsement, they could make no use of the estoppels. And it would seem that such a result is the one intended by the parties and accords with the popular interpretation of a qualified indorsement. Nevertheless, if the reasoning suggested above in the discussion of Section 66 be sound (and it seems to be the only reasoning by which a warranty can be extended to subsequent holders) the framers of the act would have been strangely inconsistent had they limited the warranty of the indorser without recourse to his immediate indorsee. A. indorses “without recourse” to B. It is everywhere the law that B. could still sue A. for a breach of warranty, which is a collateral agreement incident to the sale of the instrument. Suppose B. indorses to C. *If the warranty is assigned by the indorsement*, C. could sue A. in case the warranty were broken. Moreover, the same result would follow if B. indorsed “without recourse” to C., for the qualification cannot possibly do more than curtail B.’s liability and cannot be construed as curtailing C.’s rights against parties prior to B.

Next we notice that by Section 65 the warranty of the transferor by delivery extends only to his immediate transferee. This is a codification of what has always been the law, but, as Professor Ames remarks, if the indorser “without recourse” is liable to subsequent holders for a breach of warranty, why not also the transferee by delivery? Undoubtedly the liability of the two has always been supposed to be identical. The only answer is that the transferee not having *indorsed* the instrument to a subsequent holder, there has been no assignment of the warranty.

Professor Ames makes a further criticism on this same point.

¹ Professor Ames cites one case squarely in point which sustains his view. *Watson v. Cheshire*, 18 Iowa, 202, 1865. There seems to be no case in point the other way, although in three New York cases a point was decided which indicates that indorsers without recourse would there be held liable to subsequent indorsees. *Herrick v. Whiting*, 15 Johnson, 240, 1818; *Shaver v. Ehle*, 16 Johnson, 201, 1819; *Baskin v. Wilson*, 6 Wendel, 474. Two of these cases held that when a maker is sued by a transferee remote from the payee who indorsed without recourse, the payee is incompetent to testify on behalf of the plaintiff for the reason that he is an interested party and by proving the plaintiff’s case would be relieving himself from liability on his implied warranty to the plaintiff.

Turning to the warranties of one who indorses without qualification, he points out that "an accommodation indorser is obviously not a vendor. The party accommodated fills that position. The accommodation indorser is, therefore, not liable as a warrantor, but is chargeable only as indorser upon the bill after maturity and due notice of dishonor."¹ Yet, by Section 66, the accommodation indorser is liable as a warrantor. Here, again, the difficulty is to justify the provision of the act on the theory of warranty. As an estoppel, the matter would be simple enough. The very indorsement of the accommodation indorser should preclude him from setting up that the bill is not genuine or that prior parties had no capacity to contract, facts which are wholly inconsistent with his contract of indemnity. But on what legal principle he can be saddled with the *warranties of a vendor* is far from clear.

As to extending the warranties of the indorser to subsequent holders, therefore, the gist of the matter seems to be this: The result reached in Sections 65 and 66 are in the main just. The only possible objections would seem to be that the accommodation indorser² should not be subject to suit till after maturity, and that the warranty of the indorser "without recourse" should extend only to his immediate indorsee. Certainly with these two exceptions, the results reached are those which have long been the law. But the rules are stated in terms which are difficult to justify on any legal theory.

Professor Ames makes a further and a different criticism of these two sections. "The transferrer by delivery or by a qualified indorsement not only warrants, in Section 65, paragraphs 1, 2, and 3, the genuineness of the instrument, his title to it, and the capacity of prior parties, but also, by Section 65, par. 4, "that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." Why, asks Professor Ames, should his knowledge be irrelevant in the case of forgery or capacity of prior parties and yet be essential when the instrument is invalid because of usury or other statutory real defence, or if the transfer is after maturity, by reason of payment, failure of consideration, or other personal defence?

There is much force in the criticism. Subsection 65, par. 4, is

¹ *Central Bank v. Davis*, 19 Pick. 373; *Sus. Bank v. Loomis*, 85 N. Y. 207; *Case v. Bradburn*, 1 Daly, 256.

² If the accommodation indorser is a warrantor, he may be sued before maturity. This changes the law. See cases cited in preceding note.

evidently a codification of the New York case of *Littauer v. Goldman*,¹ which held that a defendant who transferred by delivery to the plaintiff a note tainted with usury in its inception, of which defect, however, the defendant was ignorant, could not be held liable on an implied warranty. The court, after reviewing a number of cases, concludes that there are only two implied warranties in the transfer of negotiable paper, namely, a warranty of title, and a warranty that the instrument is genuine and not forged. That case is "admittedly supported by no precedent,"² and there are decisions flatly against it.³ As Chief Justice Shaw said, in *Lobdell v. Baker*,⁴ "Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties; but he has the right to believe, without inquiring, that he has the *legal obligation* of the contracting parties appearing on the bill or note." That was a case of infancy, but the remark is equally applicable to a note tainted with usury in its inception. For in the latter case the indorsee does not get that *legal obligation* for which he contracted. It would seem, therefore, that the transferor should be held liable for a breach of warranty since the thing sold is not what it purported to be. Furthermore, as the critic points out, if "scienter" is necessary in the case of the indorser without recourse, why is it not equally necessary in the case of one who indorses without qualification? Yet Section 65, par. 4, is not incorporated by reference in Section 66.⁵

Section 68:

"As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. *Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.*"

¹ 72 N. Y. 506.

² *Wood v. Sheldon*, 42 N. J. 421. It is also disapproved of in *Meyer v. Richards*, 163 U. S. 385 (pages 411 and 412).

³ *Giffert v. West*, 33 Wis. 617; *Daskam v. Ullman*, 74 Wis. 474; *Hannum v. Richardson*, 48 Vt. 508; *Knight v. Lanfear*, 7 Rob. (La.) 172.

⁴ 3 Met. 469.

⁵ Professor Ames proposes as a substitute for Section 65-4 "that the instrument is subject to no real defence, nor, if the transfer is after maturity, or after dishonor noted on the bill, to any personal defence." In the opening of his first article, Professor Ames justly remarks that the new code would have gained in simplicity and arrangement had due emphasis been given to the distinction between real and personal or equitable defences.

Professor Ames thinks that the last sentence — which introduces a change into the law — is a blunder which should be cancelled. He says, "Joint makers, joint drawers and joint acceptors are liable only jointly. Why this arbitrary distinction?"

Judge Brewster replies that the change was made for convenience' sake, and that it "is in accord with the theory of the law already established in most of the states which adopted the reform procedure, say three-fourths of the states of the union."¹ Mr. Arthur Cohen also thinks that this change is an improvement, "by reason of its sweeping away certain technicalities. There has always been a tendency in the law merchant to consider contracts which are in form joint contracts as being intended to be joint and several." Still, Professor Ames' query "Why this distinction?" remains unanswered. If joint indorsees are to be liable jointly and severally (and it would seem that they ought to be), why not joint drawers also? Instead of cancelling the latter part of this section, however, would it not have been better to widen its scope and include joint drawers, joint makers, and joint acceptors?

Section 70:

Section 70 provides that "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument."²

This, says Professor Ames, changes the law and for the worse as to certificates of deposit. The weight of authority, represented by the leading commercial states,³ is that they must be presented to charge the bank. Five states hold that presentment is not necessary.⁴ Furthermore, under this section, "presentment would not be necessary in the case of bank notes circulating as money." The critic suggests that the words "except in the case

¹ Referring to 2 Bliss 53, Pomeroy, 2d Edition, 326, Conn. Rules of Practice, page 1, Sec. 2. For the American statutes see Randolph's Commercial Paper, Sec. 1669.

² The remainder of the section reads, "but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

³ Indiana, Massachusetts, New Jersey, New York, Pennsylvania, South Dakota, Vermont.

⁴ California, Iowa, Michigan, Minnesota, Wisconsin.

of bank notes and certificates of deposit " should be inserted after the word " necessary " in the first line.

Of course, this section was intended to apply to the maker of a note and acceptor of a bill. Evidently, from Judge Brewster's reply, the point as to certificates of deposit did not occur to the Commissioners. His defence is, " In view of the fact that no person would be likely to bring a suit on such instruments when he could get the money at the bank, and the further fact that no harm could come to the promiser excepting as to costs, which are in most, if not all the states, subject to the discretion of the court, the objection does not seem to be practical."

1. The numerous reported cases of suits brought on certificates of deposit dispose of the first part of that defence.

2. " No harm could come to the promisor excepting as to costs." All right. But how about the promisee? If no presentment is necessary, the holder's right of action accrues on the date of the certificate, and the statute of limitations runs from that date.¹ It follows that after six years the holder cannot get his money. This result is unjust. Nor is it a true answer to say that such a holder, like the holder of a demand note, has slept on his rights by allowing six years to slip by. He has not. Business custom determines such a question, and the fact is, as everyone knows, that by the custom of merchants the holder of a certificate of deposit is a *depositor*, who, like any other depositor, may leave his money in the bank for an indefinite period. The idea that he must withdraw it within six years would be a novel one to a banker. So Section 70, in so far as it applies to certificates of deposit, not only ignores the language of such instruments, which always is that the money shall be paid " on the return of this certificate," but, by barring the holder's right of action after six years from the date of the certificate, runs counter to the understanding of the business community, which regards such an individual as a *depositor*.

It is not likely that much harm will result from this section, as the use of certificates of deposit is very limited and appears to be decreasing. Nevertheless, the framers of the act slipped up on this point.

¹ In states where right of action accrues on date of certificate, statute runs from that date. When action accrues only after demand, statute runs from date of demand. For collection of authorities see Am. and Eng. Encyc. of Law, 2d Edition, 804.

Section 119:

"A Negotiable Instrument is discharged:

"1. By payment in due course by or on behalf of the principal debtor;

"2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

"3. By the intentional cancellation thereof by the holder;

"4. *By any other act which will discharge a simple contract for the payment of money;*

"5. When the principal debtor becomes the holder of the instrument, at or after maturity in his own right."

Professor Ames criticises the fourth paragraph of this section. He says, "If a creditor accepts a horse in satisfaction of his claim, not yet matured, the simple contract claim is discharged. But if the holder accepts a horse from the maker before maturity, in satisfaction of the note, the note is not discharged. The accord and satisfaction gives the maker merely a personal defence, which is cut off the moment the note is transferred to a holder in due course."

Judge Brewster's answer is, "The section evidently relates to acts between the parties. If the maker allows his note to remain outstanding, and so to be transferred, of course he should be held liable." "This," as Professor Ames says, "is very sound law, but, with all deference, this sub-section declares just the opposite. The language is that by such an accord and satisfaction 'a negotiable instrument is discharged.' If it is discharged, the maker can never be charged upon it. In all the other sub-sections of this section the discharge is complete and final."

The critic seems to have the best of it. Payment of a note before maturity is no defence against a holder in due course. That has always been the law. But a simple contract claim is discharged by payment before the claim is due, and now comes Section 119 and says that such a payment discharges a negotiable instrument. The Judge's only answer is that this section "evidently relates to acts between the parties." 1. What is meant by "acts between the parties"? 2. Why does this section evidently relate only to such acts?

Mr. Farrell makes a curious answer to this criticism. He says that Professor Ames is "construing the language of one of the

component parts of a section without reference to its connection with the others. The section declares that an instrument is discharged: by payment by the principal debtor; by payment by the accommodated party; by the holder's intentional cancellation, and (4) 'by any other act which will discharge a simple contract for the payment of money,' *i. e., any other act* which will discharge a negotiable instrument, which is but a simple contract for the payment of money, as distinguished from a specialty, in the extinguishment of which the same formality is required that is necessary to its creation. Do the other sub-sections, specifying the methods of extinguishment, refer to negotiable instruments, or to some other form of contract?"¹

Let us see. In the first place, Mr. Farrell misstates Subsection 1. It does not read "By payment by the principal debtor." It reads, "By payment *in due course* . . . by the principal debtor." That makes a difference. Now, Subsection 4 reads "*By any other act* which will discharge a simple contract for the payment of money." *I. e., any act other than the acts specified in Subsections 1, 2, and 3.* But payment *before maturity* is not within the acts specified in Subsections 1, 2, and 3, and it is an act which discharges a simple contract for the payment of money. Therefore by Subsection 4, payment before maturity will discharge a negotiable instrument.

But Mr. Farrell says that Subsection 4 ("By any other act which will discharge a simple contract for the payment of money") means "*any other act which will discharge a negotiable instrument*, which is but a simple contract for the payment of money, as distinguished from a specialty, in the extinguishment of which the same formality is required that is necessary to its creation." Now, with all deference! The purpose of Section 119 was to answer this question, "What acts will discharge a negotiable instrument?" To say that the answer given is "A negotiable instrument is discharged by acts 1, 2, 3, and *any other act which will discharge a negotiable instrument*" is to say that Mr. Crawford and the Commissioners had lost their wits. It reminds one of the celebrated excuse for drinking:

"If I the reasons well divine,
There are just five for drinking wine:
Good wine, a friend, or being dry,
Or lest you should be by and by,
Or any other reason why."

¹ The Negotiable Instruments Law, by John L. Farrell, Brief of Phi Delta Phi, Vol. III, No. 2, First Quarter, 1902.

Perhaps a negotiable instrument is "a simple contract for the payment of money, as distinguished from a specialty." But it is certainly true that it is *negotiable*, and in this respect differs from all other simple contracts for the payment of money. From this *negotiability* arise certain rules not applicable to non-negotiable contracts for the payment of money. At least one of these rules relates to the discharge of a bill or note, and Professor Ames' illustration shows that Subsection 119, par. 4, goes too far in that it practically places the discharge of a negotiable instrument and the discharge of a non-negotiable simple contract for the payment of money on the same footing.

Why Subsection 119, par. 4, was inserted does not appear. As Professor Ames says, "It would be superfluous even if it were accurate." It has no counterpart in the English act, nor apparently in any other existing code. Mr. Crawford's Annotation, which usually gives the cases upon which each section is based, is silent as to 119, par. 4. But that this subsection will be permitted to upset such a rule as that which declares that payment before maturity is no defence against a holder in due course, is unbelievable, though it must be confessed that in limiting its meaning, the courts will probably have to proceed on the ground that any other interpretation would be revolutionary, unjust, and absurd.

Section 120, par. 3:

"A person secondarily liable on the instrument is discharged:

"(3) By the discharge of a prior party."¹

"This subsection," says Professor Ames, "is the most mischievously revolutionary provision in the new code. It means that if the maker is discharged by the statute of limitations, all

¹ The entire section reads:

"A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. *By the discharge of a prior party.*
4. By a valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

the indorsers are *ipso facto* discharged. It means that if a joint note is executed by 'A., principal,' and 'B., surety,' and B. dies, whereby the whole burden survives to A., all the indorsers are discharged. It means that if by some inadvertence due notice should not be given to the first indorser so that he would be discharged, all subsequent indorsers, although duly notified, would also be discharged. It would mean, but for the saving grace of Section 16 of the National Bankrupt Law, that an indorser would be discharged if any prior party received his discharge in bankruptcy."¹

Judge Brewster's reply is that Subsection 3 means only the discharge of a prior party *by the holder*, and to show this he argues:

1. The other paragraphs of Section 120 refer to acts of the parties, not to acts of law.

2. In none of the ten books on commercial paper published since the new act was legislatively adopted, is there a suggestion that Subsection 120, par. 3, changed the law.

3. That two or three text-books state the law in words practically the same as those used in Subsection 120, par. 3.

4. It is a rule of statutory construction that in statutes or revisions condensing or in general restating the common law, no change is presumed except by the clearest and most imperative implication.

Judge Brewster thinks that the critic is unjust in trying to read

¹ This section, which has no counterpart in the English act, seems to have been developed out of the New York case of *Shutts v. Fingar*, 100 N. Y. 539, 1885. In *Merritt v. Todd*, 23 N. Y. 28, 1861, the New York court laid down the rule that in order to charge the indorser of a demand note in New York, it is not necessary, as it is in other jurisdictions, to present the note for payment within a reasonable time. *Merritt v. Todd* was followed by later New York cases, though it has now become obsolete through the adoption by New York of the Negotiable Instruments Law, which provides that an instrument payable on demand must be presented within a reasonable time after issue. "In *Shutts v. Fingar* the holder failed to present a similar note to the maker until after the latter was discharged by the statute of limitations, but claimed the right, under the authority of *Merritt v. Todd*, to charge the indorser by a presentment at any time. The court, however, declined to follow that case to its logical conclusion. While adhering to the doctrine that the presentment of a demand note need not be made within a reasonable time, they decided that such a note must be presented before the maker was discharged by the statute of limitations. This, it will be seen, is a totally different proposition from that of Subsection 3. Since *Merritt v. Todd* has become obsolete through the adoption of the Negotiable Instruments Law, *Shutts v. Fingar* is now nothing more than a legal curiosity." And see, also, *Crawford's An. N. I. L.* 84, notes A and C.

into Subsection 3 the words "by operation of law." Professor Ames retorts that Judge Brewster is trying to read into this subsection the words "By the holder." Furthermore, says the critic, if the words "by the holder" are to be read in, this subsection will apply to only one case which is not already covered by the other paragraphs of this section, and in that one case it works injustice. A. makes a note for the accommodation of B. If the holder, with knowledge of the accommodation, releases A., this subsection would discharge B., the accommodated indorser. Yet the decisions are the other way,¹ and rightfully, for the action of the holder in releasing A. has not prejudiced B., since the latter could not, on paying the holder, have any right over against the accommodation maker.

The rather lame answer given amounts to this: If all that is true, what possible harm can Subsection 120, par. 3, do, except to discharge the indorser in the case you suppose?

The subsection says simply "By the discharge of a prior party." That would seem to mean *any discharge*; a discharge by operation of law, or a discharge by the holder. If the Commissioners meant only the latter (and of course that is all they did mean), why did they not say so? It is to be earnestly hoped that the courts will adopt Judge Brewster's interpretation. It is to be as earnestly regretted that the Commissioners did not express themselves unmistakably on so important a point.

Professor Ames also criticises paragraphs 5 and 6 of Section 120, which read:

"5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

"6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

They are inaccurate, he says, in point of law. "If the party primarily liable is an accommodation acceptor or maker, a release of him by the holder, or a binding agreement to give him time,

¹ Collott v. Haigh, 3 Campbell, 281; Hill v. Read, D. & Ry. N. P. 26; Sargent v. Appleton, 6 Mass. 85; Parks v. Ingram, 22 N. H. 283; and see also Ludwig v. Iglehart, 43 Md. 39; Gloucester Bank v. Worcester, 10 Pick. 528; Bruen v. Marquand, 17 Johnson, 58.

does not discharge the accommodated drawer or indorser. The discharge of the drawer or indorser in such cases would be highly inequitable. The action of the holder cannot possibly prejudice them, for, under no circumstances, would they, on paying the holder, have any right, either by subrogation or indemnity, against the accommodation acceptor or maker."

Professor Ames assumes that both these subsections have to do with releasing or giving time to "the person primarily liable." Possibly there is room for doubt as to that. Subsection 5 speaks of "the principal debtor." Now the person "primarily liable" on the instrument is the person who, by the terms of the instrument, is absolutely required to pay the same; whereas, by the words "principal debtor" we usually or at least very frequently mean the person ultimately liable for the amount of the instrument. If A. makes his note for B.'s accommodation, A. is "primarily liable," for, by the terms of the instrument, he is absolutely required to pay the same, but B., the accommodated payee, is "the principal debtor" who must ultimately foot the bill. On the other hand, paragraph 6 evidently refers to an extension of time given to the person "primarily liable." Now, if Subsection 5 refers only to a *release* of "the principal debtor," Professor Ames' illustration of the accommodation note is not in point, because the accommodated indorser would not be discharged by a *release* of the accommodation maker, the latter not being "the principal debtor." But by Subsection 6 an *extension of time* given to the accommodation maker would discharge the accommodated indorser.¹

Assuming, however, that Professor Ames is correct in supposing that both Subsections 5 and 6 apply to *the person primarily liable on the instrument*, even though he may not be *the principal debtor*, his illustration shows that these subsections are not wholly satisfactory.

Judge Brewster's reply admits that the cases dealing with the point raised by Professor Ames' illustration are sound, but says that they are not disturbed by the Negotiable Instruments Law, for "The law is intended to set out the legal liability on the instrument as such, in the due course of commercial transactions. It could never be held to mean that a party who had paid money

¹ But the cases on this point make no distinction between releasing an accommodation maker or acceptor and giving him an extension of time. See cases cited in preceding note. Nor does there appear to be any reason for making such a distinction.

for another's accommodation could not at law, if not on the instrument, recover it back. That is a matter between the parties, entirely outside of the effect of the instrument in the hands of a holder."

The answer is scarcely responsive, as Professor Ames is talking about taking away from the holder his right against the accommodated indorser, and not about a person's right to recover money paid for another's accommodation; but evidently Judge Brewster's idea is that the act is dealing solely with the *discharge of the instrument*, and does not discharge any other actions at law that the parties may have. That is true, but it furnishes no reason for denying an action on the instrument whenever an action on the instrument should lie. Moreover, if the holder, in Professor Ames' illustration, took the note *in absolute payment of a debt*, what rights would he have against the accommodated indorser after the latter is discharged from liability on the note?

Finally, Professor Ames objects to Subsections 5 and 6 as the superfluous introduction of doctrines of suretyship into a negotiable instruments code, and if these are to be introduced, he thinks that other doctrines of suretyship of equal importance should be inserted, as, for instance, the doctrine that the accommodation maker or acceptor, although the party primarily liable on the instrument, will be discharged if the holder, with knowledge of the accommodation, releases or undertakes to give time to the accommodated drawer or indorser.

Section 124:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

"But when an instrument has been materially altered, and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor."¹

¹ Section 64 of the English Bills of Exchange Act reads,

"Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

"*Provided*, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor."

The criticism of this section is contained in a note published subsequent to the articles in the Harvard Law Review and is based upon the case of *Jeffrey v. Rosenfeld*,¹ decided by the Supreme Court of Massachusetts in September, 1901.

At the common law, the material alteration of a negotiable instrument without the assent of all parties liable thereon avoided the instrument except as against a party who made, authorized or assented to the alteration, and subsequent indorsers. The rule applied to an alteration made by a stranger as well as to an alteration made by a party to the instrument. Section 64 of the English act perpetuates the common law rule with the exception of a proviso inserted for the benefit of a holder in due course, under which he may enforce, according to its original tenor, a bill which has been materially altered, if the alteration is not apparent. The proviso, however, does not concern us in this discussion.

The American courts early changed the common law rule to the extent of holding that an alteration made by a *stranger* was a mere spoliation or trespass, and that the holder could still enforce the instrument in its original form. Now Section 124 of the American act is practically the same as Section 64 of the English act. Therefore, says Professor Ames, we are in this dilemma: "Either the English and American sections, although expressed in the same terms, must be interpreted differently, or else the American law is changed, and, as it seems to the writer, for the worse. To avoid the second horn of the dilemma involves great straining, not to say perversion, of simple English words."

How one can see any ambiguity in Section 124 is a mystery. It reads, "When a negotiable instrument is materially altered . . . it is avoided," etc. An alteration made by a stranger is not excepted, and certainly it is none the less an alteration because made by a stranger. To say that such an alteration is not covered by Section 124 would be, as Professor Ames says, "a great straining, not to say perversion, of simple English words." Judge Brewster agrees with the critic on this point. The only person who has ever suggested a doubt as to the meaning of this section is Mr. Justice Morton, who wrote the opinion in *Jeffrey v. Rosenfeld*, *supra*. In that case, a note secured by a mortgage was altered, though by whom did not appear. On a bill in equity to restrain the foreclosure of the mortgage, the court sustained the holder's right to foreclose without interpreting Section 124 of the

¹ 61 N. E. R. 49.

code, though Justice Morton, in an *obiter dictum* of some length, remarked that the question of its interpretation was one that deserved serious consideration. After referring to the authorities in this country which decided that a material alteration made by a stranger will not avoid the instrument, he adds, "It would seem not unreasonable to suppose that it was the intention of the framers of the American act that Section 124 should be construed according to the law of this country, rather than that of England." As a generality, that remark is profoundly true and applies to all the sections of the new act. They should be construed according to American law rather than English law. As applicable to the particular point under discussion, however, the remark is of small value. If the language of Section 124 is clear and unmistakable, it should be given its plain meaning. To construe it according to American law does not mean to knock it down simply because it changes American law somewhat. The learned Judge points out no ambiguity in the language of this section. His sole reason for doubting its very plain meaning is that it changes the law. As a matter of fact we learn from Judge Brewster that it was intended to change the law; that Mr. Crawford reported to the Conference in 1896 in favor of adopting the common law rule as to alterations by a stranger, in order that the law of the two countries might be uniform on this important point, and in order that the benefit of written evidence might be preserved. This view was approved by the Conference, and Section 124 was inserted to restore the English rule.

Professor Ames thinks that the change is for the worse, though he vouchsafes no reasons. Under such circumstances, the profession cannot be blamed for accepting without question the judgment of the learned and experienced experts who drafted the new act. But at all events, there is no ambiguity in this section. Its meaning is unmistakable.

Section 137:

"Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same."

Says Professor Ames, "A refusal to accept is an acceptance! Such a perversion of language would be strange enough any-

where, but in a deliberately framed code is wellnigh inexplicable. As a consequence of this fantastic provision the holder may bring concurrent actions: against the drawee because of his fictitious acceptance, and against the drawer because of the drawee's non-acceptance. Nor is anything gained by this fiction, of which there is no trace in the English act. All the demands of justice are met by holding the misconducting drawee liable for a conversion of the bill."

How the holder could bring concurrent actions is not clear. He may sue the drawee, for under this section the latter is deemed to have accepted. But how could he proceed "against the drawer because of the drawee's non-acceptance"? The drawee "is deemed to have accepted." In legal effect, therefore, he has accepted, and so the holder must wait until the bill is dishonored for *non-payment*, before a right of action accrues against the drawer.

Mr. Cohen also disapproves of Section 137, though on another ground, namely, that this section "would seem to imply that if a bill be destroyed or not returned accepted within a reasonable time, notice of dishonor need not be given to the drawer. This is not in my opinion the law, and ought not to be the law." There is force in this objection. By destroying the instrument or refusing to return it to the holder, the drawee surely indicates that he does not propose to honor it. It would seem that the drawer should be instantly apprised of this in order that he may proceed at once to recover the funds that he has placed in the drawee's hands. And if the destruction of a bill amounted to a dishonor of it, the drawer would have that right, but by regarding it as an acceptance all actions are postponed until after the day of maturity.

The idea that the wrongful retention or destruction of a bill by the drawee to whom it had been presented for acceptance, is of itself an acceptance, seems to have been introduced in 1808 by Lord Ellenborough in the case of *Harvey v. Martin*.¹ He reiterated that view in a dissenting opinion in *Jeune v. Ward*,² but the majority decided otherwise, and held that such a destruction or refusal to return, while rendering the drawee liable for conversion, was not an acceptance. *Jeune v. Ward* settled the English law on this point, and it has never been changed. On principle, that decision seems to be correct, and the view there expressed is

¹ 1 Campbell, 425 n.

² 2 B. & A. 653, 1818.

approved by such commentators as Bayley, Chitty, Story, Parsons, Daniel and Tiedeman,¹ all of whom regard the idea that the retention or destruction of a bill amounts to an acceptance, as illogical and quite unnecessary.

Mr. Farrell, in defending Section 137, recalls the rule that the holder of an instrument may join the drawer and drawee in the same action, and points out that if he were restricted to an action for conversion against the drawee, that action sounding in *tort* could not be joined with the action *ex contractu* against the drawer. Whether the advantage which results from the simple fact of joining the two actions will compensate for dispensing with the necessity of notifying the drawer of the refusal to return the instrument or the destruction thereof, and for adopting a rule so questionable on principle, may be seriously doubted. One never views without concern the insertion of a pure legal fiction in a statute.

But the rule adopted is far from being without support. By the New York statute, from which this section of the code is copied, "every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or refuse, within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, accepted or non-accepted to the holder, shall be deemed to have accepted the same."² And several states have substantially copied the New York statute.³

Judge Brewster says that from all these states came the report that this provision "'had worked well.' The bankers regarded it as a simple, practical, definite, working rule." Probably, therefore, we are justified in hoping that it will "work well" in the Negotiable Instruments Law.

Section 175:

"Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to,

¹ Bayley on Bills, Chapter vi, Sec. 1; Chitty on Bills, star page 296; Story on Bills, Sec. 248; 1 Parsons, 285; 1 Daniel's Negotiable Instruments, Sec. 500; Tiedeman on Commercial Paper, Sec. 224.

² 2 Rev. St. of N. Y. (6th Ed.) 1161. Though it was decided that under this statute the holder, in order to recover, must prove a conversion of the bill. *Matteson v. Moulton*, 79 N. Y. 627.

³ Alabama, Arkansas, Idaho, Kansas, Nevada, Washington, California.

both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.”¹

When a bill has been protested for non-payment, a third person — who may or may not be a party to the bill — may intervene and pay the bill for the honor of any party or parties thereto. The payer for honor is then, by Section 175, subrogated to the rights of the holder as regards the party for whose honor he pays, and all persons *liable to the latter*. Suppose A. draws on B. and the latter accepts for A.’s accommodation. The bill is dishonored and X. pays it for the honor of the drawer. Since B., the accommodation acceptor, would not be liable to the accommodated drawer in case the latter took up the bill, X., the payer for honor, cannot, under this section, sue B. He may sue only A. and all parties *liable to the latter*.

This rule was laid down in 1808 by Lord Erskine in *Ex parte Lambert*.² For many years that case was everywhere regarded as an authority. No text writer doubted its soundness, and the only two American cases in which the point has been raised,³ decided in 1835 and 1846, followed Lord Erskine without hesitation. But in *Ex parte Swan*,⁴ decided in 1868, Malins, V. C., condemned the doctrine of Lord Erskine and laid down the opposite rule, viz., that the payer for honor should be subrogated to the rights of the holder against the party for whose honor he pays, and all parties *prior to* (not liable to) the latter. In 1882, however, the English code enacted Lord Erskine’s rule. Professor Ames says that this was evidently a mere oversight. “Mr. Chalmers, in his excellent treatise, is careful to indicate every instance in which the English act modifies the previous law, but he gives no intimation that Section 68–5 introduced any change. One must infer that he was unconscious of any change. This inference is confirmed by the first edition of his Digest,⁵ published four years before the passage of the English act, in which he defines the right of the payer for honor in substantially the same language as that of the act. Mr. Chalmers’ statement of the result of the

¹ This section is identical with Section 68–5 of the English Act.

² 13 Ves. 179. Disapproving of the contrary view expressed in *Ex parte Wackerbath*, 5 Ves. 574, 1800.

³ *Gazzam v. Armstrong*, 3 Dana [Ky.], 554, 1835; *McDowell v. Cook*, 6 Smed. & M. [Miss.] 420, 1846; and see Sharswood’s Edition of Byles on Bills, 406 n.

⁴ L. R. 6 Eq. 344–365.

⁵ Page 192.

decisions is in general so accurate that one wonders at this slip, which is all the more surprising, because in his table of cases overruled, he includes *Ex parte* Lambert as overruled by *Ex parte* Swan."

Of course it is possible, though scarcely likely, that when Judge Chalmers published his Digest in 1878, he overlooked the fact that *Ex parte* Lambert had been overruled by *Ex parte* Swan. It is scarcely believable, however, that the experts who revised Judge Chalmers' original draft of the Bills of Exchange Act, who certainly had both cases before them, should have been unconscious of the fact that they were codifying the overruled decision. The probable, natural, and reasonable explanation is that they preferred the doctrine of Lord Erskine to the doctrine of Chancellor Malins. However this may be, Lord Erskine's doctrine has certainly been the law for twenty years last past in England, and it is the doctrine laid down in the only two American cases on this point. Therefore, when one criticises the American Commissioners for not digging up the rule of *Ex parte* Swan, it would seem to be incumbent on him to show very clearly that *Ex parte* Lambert is wrong and *Ex parte* Swan right. It is true that the latter rule prevails in the codes of Germany and France,¹ and that it formerly prevailed in the California code.² Beyond this, Professor Ames presents nothing in support of it. As a matter of fact, it is far from clear that the rule of the American and English acts is not the better of the two. It certainly lessens litigation, for if the payer for honor may sue the accommodation acceptor the latter will then proceed against the accommodated drawer. Aside from this, there seems to be justice and common sense in the view that when X. steps in and pays for A.'s honor a bill on which the latter is liable as drawer, X. should be regarded (except as to his undoubted right to reimbursement from the man whose debt he has paid), as having stepped into A.'s shoes, and therefore should have only those rights which A. would have had in case he had paid his own debt.

Section 186:

"A check must be presented for payment within a reasonable time after it is issued, or the drawer will be discharged

¹ French Code de Commerce, Art. 159. German Wechselordnung, Sec. 63. Translated in 3 Randolph's Commercial Paper, 2d Edition.

² Sec. 3205, 3 Randolph's Commercial Paper, 2d Edition.

from liability thereon to the extent of the loss caused by the delay.”¹

No similar provision is made for the effect of not giving due notice of dishonor when the check has been presented but not paid. Now Section 185 provides that “Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.” Therefore the effect of a failure to give due notice of dishonor to the drawer of a check must be governed by Section 89, under which delay in giving notice of dishonor to the drawer of a bill absolutely discharges him, although the delay has not caused him any loss. In other words, delay in presenting a check for payment discharges the drawer from liability thereon only to the extent of the loss caused by the delay, but delay in giving the drawer notice of dishonor absolutely discharges him. Yet the Courts and the text writers give the same effect to delay in presenting a check and delay in sending notice of its dishonor.² In both cases the drawer is discharged only to the extent of the loss caused by the delay. That is Professor Ames’ objection to this section.

Judge Brewster shifts his ground somewhat in replying to this criticism. In his first paper he seems to admit that delay in notifying the drawer of a check will absolutely discharge the latter, and says, “Suppose it is so, technically, with reference to the check itself. What is the harm? The debt is not discharged, except for laches. The holder can sue on his debt just the same as he could have done before the check was given. . . . The section seems to be harmless in any view.”

Professor Ames disposes of that answer as follows: “In all other cases a creditor who, by his laches, discharges his debtor from liability on a bill given in conditional payment of a debt, forfeits also all right to the debt. Furthermore, suppose a check to be given in absolute payment of the drawer’s debt, or in consideration of the payee’s release of a claim against a third person. Surely in either of these cases, the holder who loses his right on the check, has lost everything.”

Then in his second paper, Judge Brewster claims that, “Since

¹ This provision is copied from Section 74 of the English act.

² *Clark v. Nat. Bank*, 2 MacArthur, 249; *Griffin v. Kemp*, 46 Ind. 172; *Gregg v. George*, 16 Kan. 546; *Stewart v. Smith*, 17 Ohio St. 82; *Purcell v. Allemong*, 22 Grat. 739; *In re Brown*, 2 Story, 502; *Story, Prom. Notes*, 493; *Dan. Neg. Inst.* (4th Edition) 1587; 2 *Benj. Chal.* (2d Edition) 270.

the only penalty for delay in presentment (186) is the loss occasioned by delay, and *not* a discharge, the natural inference therefrom would be that the same exceptional exemption as to checks would continue in case of non-payment, namely, that the only penalty would be the loss occasioned by the delay, and *not* any absolute discharge, as claimed by the Dean." All admit that this ought to be the law, and again it is pertinent to inquire, "If the Commissioners meant that, why did they not say so?" A few short words would have settled the matter. Why, then, rely on "the natural inference"? Does the history of the making and interpreting of statutes vindicate the wisdom of relying on the courts to "infer" the right thing, or does it rather teach that the language of a statute cannot be too clear? And in this case it may not be such "a natural inference" after all, when the learned Chairman of the Conference which framed the act sees it only after second thought.

Judge Brewster regards Professor Ames' objections to this section as "the most truly academical criticism in the whole list." Evidently his reason for this view is that although the rules laid down in Sections 89 and 186 are copied from the English act, and have been repeated in all the cases and text-books since the first edition of Byles on Bills, no one has doubted during all this period that the same result flows from delay in sending notice of the dishonor of a check as from delay in making presentment. As to the cases and the text-books, that argument is worth little. Language used by a court must be construed with strict regard to the particular facts to which the language relates, and is authoritative only when so construed. Language used by a text writer is not authoritative at all, and is of little assistance even, unless construed with reference to the particular line of cases under discussion. Language used in a statute is read in a different light. An inaccuracy of statement which causes little confusion and no real harm in the opinion of a judge or in a text-book, may prove positively mischievous in a statute. But the fact that these same provisions have proved satisfactory in the English act for twenty years — while not disproving the objection that they are inaccurate — does indicate that little or no harm will result from that inaccuracy.¹

¹ Mr. Farrell argues that Section 89 cannot refer to a check, because it provides that when an instrument has been "dishonored by non-acceptance or non-payment" notice of dishonor must be given. And he reasons that since a check need not be

This concludes the discussion. If it is permitted to offer a cautious generalization on this controversy, it is submitted that although Professor Ames has pointed out two or three actual errors in the new law and has shown that in still other instances the language might have been improved upon, nevertheless, these errors and imperfections are not sufficiently numerous or important to make one seriously doubt the advisability of adopting the Negotiable Instruments Law in every state in the Union. It is easy to lose one's perspective and sense of proportion in such a matter. The flaws in the act, few though they be, when grouped together and considered alone, seem formidable. Yet, when a survey is made of the entire statute, when one regards the many salutary provisions which settle disputed questions or introduce needed changes, when one studies the admirable simplicity and accuracy of most of its provisions and considers the comparative unimportance of most of the flaws which have been discovered, then the shortcomings of the Negotiable Instruments Law shrink to their real size and (though still apparent) do not seem likely to seriously impair its usefulness. It is unfortunate that the Commissioners did not have the benefit of Professor Ames' criticisms when they were revising the original draft of the act.¹ That some of them would have been adopted (to the benefit of the act) can scarcely be doubted. But the act having been started on its course and legislatively adopted in a number of states before these errors were discovered, it was decided, and no doubt wisely decided, that it was unnecessary and impolitic to start the work of amendment at that stage of its career. The readiness of several state legislatures to adopt the act in spite of the criticisms that have been made upon it and the very small amount of litigation that has arisen under it in jurisdictions where it has been in force for several years, have thus far vindicated the soundness of the Commissioners' decision.

Undoubtedly, however, Professor Ames has rendered substantial service to the Negotiable Instruments Law. He has pointed out the difficulties and possible dangers that lurk in some sections of it, and a careful study of his criticisms by those courts which will be called on from time to time to construe these sec-

presented for acceptance, Section 89 does not apply. The error is obvious. Section 89 reads, "dishonored by non-acceptance or non-payment." Therefore when a check is dishonored by non-payment, Section 89 does apply.

¹ Professor Ames saw the act for the first time after its adoption by four state legislatures.

tions, will serve to avoid some confusion and several unfortunate decisions. After all, many, if not most of the flaws in the act can be overcome by a careful construction.

Finally, the whole controversy should serve as a useful lesson to those who will in future direct the preparation of statutes codifying other branches of the law in this country. The Negotiable Instruments Law was originally drafted with the greatest care by a learned expert. It was then revised by a sub-committee of the Commissioners on Uniform State Laws, and was then revised by the Commissioners themselves at their annual conference. In addition to this, the statute, prior to its adoption by the Conference, had been brought to the attention of a number of experts generally throughout the country, and had received at least some consideration at their hands. Moreover, all who shared in the preparation of the act enjoyed the very great advantage of having before their eyes the English Bills of Exchange Act, which offered suggestions on every important point; afforded a constant opportunity for useful comparisons; whose provisions moreover could be examined in the light of twenty years' experience. In spite of all this, some errors (precisely how serious no one can say as yet) crept into the Negotiable Instruments Law which might have been avoided had the act, prior to its final revision, been subjected for several years to the most searching criticism obtained by giving to it the widest publicity and by soliciting the active co-operation of the considerable number of men whose thorough knowledge of the law of negotiable paper, whether from the standpoint of the banker, the practitioner, or the student, had fitted them to render valuable assistance in the preparation of a code on that subject. The two or three additional years consumed by pursuing this method would have yielded an ample return, and those who would object to the labor, expense, and time required by this method little appreciate the gravity and difficulty of the task of embodying the law in a series of authoritative, abstract propositions. Many will regard the shortcomings of the Negotiable Instruments Law as not very serious, but all may well remember that these shortcomings (such as they are) can probably be ascribed to the lack of adequate criticism.

CHARLES L. MCKEEHAN.

THE NEGOTIABLE INSTRUMENTS LAW — NECESSARY AMENDMENTS.¹

BY JAMES BARR AMES.

THE Negotiable Instruments Law has been enacted in twenty states and the District of Columbia. There is reason to believe that it would have been adopted in some other states but for the criticisms of several of its provisions in earlier numbers of this Review.² In the American Law Register for August, September, and October there is a series of articles by Mr. Charles L. McKeehan upon "The Negotiable Instruments Law — A Review of the Ames-Brewster Controversy."³ Whether readers agree or disagree with the reviewer's conclusions, all must recognize his ability, impartiality, and knowledge of his subject. This year most of the biennial legislatures meet, and attempts will be made to secure the enactment of the new code in additional states. It is quite possible that attempts will also be made to amend the Law in some states which have adopted it.

It is not the object of this paper to reiterate in detail former criticisms upon the new code. But, inasmuch as the reviewer of the Ames-Brewster controversy sustains the greater part of these criticisms,⁴ it seems worth while to point out that the most serious defects in the new code are in those sections in which the codifiers departed from the model of the English Act, and to call attention to two sections in which the defects, though common to both Acts, not only change well-established American law, but also threaten serious injustice.

¹ Reprinted from 16 Harv. L. Rev. 255.

² 14 Harv. L. Rev. 241, 442; 15 Harv. L. Rev. 26. These criticisms and the replies thereto by Judge Brewster in 10 Yale L. J. 84; 15 Harv. L. Rev. 26, together with a letter from Mr. Arthur Cohen, Q. C., to Judge Brewster, and the text of the Negotiable Instruments Law have been published in a pamphlet by the Harvard Law Review Publishing Association.

³ 41 Am. L. Reg. 3, 499, 561.

⁴ It is right to say that Mr. McKeehan has convinced the writer that his first objection to § 49 is fully met by the suggestion that the indorsement required of the transferor might in certain cases be a qualified indorsement. If the American courts would follow the Scotch precedent of *Hood v. Stuart* (Court of Sess. March 20, 1870) in which case the assignee of the accommodated payee was allowed without the aid of the latter's indorsement to charge the accommodating acceptor, his second objection to that section would disappear also. He must dissent, however, from Mr. McKeehan's view that the case of accommodation and the case of fraud are to be treated in the same manner. The reason for the distinction is clearly pointed out in the Scotch case.

The sections that would be wisely amended by making them uniform with the English Act are eight, namely, 20, 40, 65-4, 119-4, 120-3, 120-5, 120-6, and 137. The other two are sections 124 and 186.

SECTION 20 makes an agent, who signs his principal's name without authority, liable on the instrument. The decisions and text writers are almost unanimous against this doctrine,¹ which arbitrarily imposes upon the parties a contract which was not in the contemplation of anybody. It may work, too, very unjustly. It is right that the agent should be held to warrant his authority to act as agent, and made to answer to the other party for damages suffered by reason of his not getting the principal's obligation. But to make the ostensible agent liable for the face of the instrument, when the contemplated principal was insolvent, would give the holder unjust enrichment and impose an undeserved penalty upon such agent.² To amend this section, strike out in the fourth line the words "if he was duly authorized."

SECTION 40. Section 8-3 of the English Act, of which Sections 9-1 and 9-5 are a reproduction, was intended to supersede the doctrine of *Smith v. Clarke*,³ by which an instrument indorsed in blank continued negotiable although subsequently indorsed specially.⁴ But Section 40 revives *Smith v. Clarke* by enacting that "where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery." Mr. McKeehan endeavors to save this section by reading into it before the word "payable" the word "originally."⁵ But this is inadmissible. Instruments payable to bearer are defined with

¹ *Hall v. Crandall*, 29 Cal. 567; *Lander v. Castro*, 43 Cal. 497; *Taylor v. Shelton*, 30 Conn. 122; *Duncan v. Niles*, 32 Ill. 532; *Seeberger v. McCormick*, 178 Ill. 404, 417; *Thilmany v. Iowa Co.*, 108 Iowa 357, 363; *Noyes v. Loring*, 55 Me. 408; *Bartlett v. Tucker*, 104 Mass. 336; *Sheffield v. Ladue*, 16 Minn. 388; *Cole v. O'Brien*, 32 Neb. 68; *Patterson v. Lippincott*, 47 N. J. Law 457, 459; *White v. Madison*, 26 N. Y. 117; *Miller v. Reynolds*, 92 Hun 400; *Delius v. Cawthorn*, 2 Dev. 90; *Bryson v. Lucas*, 84 N. C. 680, 683; *Trust Co. v. Floyd*, 47 Oh. St. 525; *Hopkins v. Mehaffy*, 11 S. & R. 126 (semble); *Story*, Ag. (9th ed.) § 764 a; *Mechem*, Ag. § 550; *Huffcut*, Ag. § 230; *Reinhard*, Ag. § 307.

In two or three states an agent who without authority signs "A. B. agent for C. D." is held liable on the instrument, everything after his own signature being ignored. *Byars v. Doores*, 20 Mo. 284; *Weare v. Gove*, 44 N. H. 196. But no case has been found in which A. B. signing simply the name of "C. D." was charged on the instrument.

² *Re Nat. Co.*, 24 Ch. Div. 367, 372, 375.

³ *Peake*, 225.

⁴ *Chalmers*, Bills of Exch. Act (5th ed.) 24; *Mr. Cohen's letter*, 15 Harv. L. Rev. 37. *Supra*, p. 93.

⁵ 41 Am. L. Rev. 461. *Supra*, p. 119.

great care in Section 9 as including several species of instruments. Wherever the generic term is used without qualification in another section, it cannot be limited to one of the species.¹ Furthermore, Mr. Crawford, the draughtsman of the new code, in his note to Section 40 cites *Smith v. Clarke* as if still law. So do the other commentators upon the Act.² Mr. McKeehan's suggestion is also opposed to the interpretation given to this section by Judge Brewster, the Chairman of the Committee on Uniform Laws. Section 40 should be expunged.

SECTION 65-4 introduces the novel distinction that a transferor by delivery is a warrantor of title and genuineness only to his immediate transferee while the similar warranty of the indorser without recourse runs to all subsequent holders. There is no authority for this arbitrary distinction.³ The only decision on the point is against this distinction.⁴

Another new and unfortunate distinction is introduced by subsection 4, by which the transferor of an instrument void for usury is not liable as a warrantor, unless he was aware of the usury, whereas the transferor of an instrument void for coverture or voidable for infancy is liable as a warrantor, although he was ignorant of the coverture or infancy. This distinction is due to the anomalous decision in *Littauer v. Goldman*,⁵ and the anomaly, already condemned in other jurisdictions,⁶ should not be per-

¹ Section 9-1 reads: "The instrument is payable to bearer when it is expressed to be so payable." Mr. McKeehan understands this section to mean only instruments originally payable to bearer. Such was formerly the opinion of the writer. 14 Harv. L. Rev. 246. *Supra*, p. 46. But clearly it must apply to an instrument originally payable to order and indorsed by the payee expressly "Pay to bearer." Whether, therefore, an instrument is payable to bearer under each of the paragraphs of Section 9 would seem to depend upon the form of the instrument, not at the time of its creation, but at the moment of inspection. An instrument originally payable to order may become payable to bearer by an indorsement to bearer or by an indorsement in blank, and conversely an instrument originally payable to bearer may cease to be so payable by a special indorsement.

² Norton, *Bills & Notes* (Tiffany's ed.) 116; Huffcut, *Neg. Inst.* 24; 17 Bank. L. J. 12 and 775; Selover, N. I. L. 189 n. 78, citing cases like *Smith v. Clarke*.

³ The New York cases cited by Mr. McKeehan in 41 Am. L. Reg. 567, n. 12, in which an indorser without recourse was held to be incompetent to testify in an action by a remote holder against the maker, lend no support, it is submitted, to the notion that such an indorser was liable to the remote holder. He was incompetent even if not liable directly to the plaintiff, for if the plaintiff failed to charge the maker, he might proceed against his transferor, and the latter against his predecessor, and so ultimately the indorser without recourse might be sued by his immediate transferee.

⁴ *Watson v. Chesire*, 18 Iowa 202.

⁵ 72 N. Y. 506.

⁶ *Wood v. Sheldon*, 42 N. J. Law, 421, 424; *Meyer v. Richards*, 163 U. S. 385 411, 412.

petuated in the Negotiable Instruments Law. In one class of cases the transferor's warranty is rightly limited by his knowledge of the facts at the time of transfer. If the instrument is not collectible by reason of the insolvency of prior parties, he warrants only his ignorance of such insolvency.¹ Section 65 should be amended so as to read as follows:

"Every person negotiating an instrument by delivery merely, or by indorsement, with or without qualification, warrants to his immediate transferee,

"1. That the instrument is genuine and in all respects what it purports to be.

"2. That he has a good title to it.

"3. That it is subject to no real defence, and, if the transfer is after maturity, that it is subject to no personal defence, in favor of any party to the instrument.

"4. That he has no knowledge of any fact which impairs its collectibility."²

Because of the amendment of Section 65, Section 66 should also be amended by cancelling everything after "qualification" in the first line to "engages" in the sixth line.

SECTION 119-4 provides that a negotiable instrument is discharged "by any other act which will discharge a simple contract for the payment of money." The acceptance of a chattel in satisfaction of an unmatured simple contract claim discharges it. Therefore such a satisfaction of a note before maturity must, according to this provision, discharge the note. This is a startling innovation, and doubtless to no one more surprising than to the framers of the Act. Mr. McKeehan recognizes the justice of the criticism upon this section.³ The provision should be cancelled. It would be useless even if it were not mischievous.

SECTION 120-3. "A person secondarily liable on the instrument is discharged:—By the discharge of a prior party." If the word "discharge" is to receive its natural interpretation, standing as it does without any qualification, it must mean any

¹ Cases cited in Chalmers, Bills of Exch. Act (5th ed.) 195, n. 1. See also Gordon v. Irvine, 105 Ga. 144; Brown v. Montgomery, 20 N. Y. 287 (seller of post-dated check knew that another check of drawer had just been dishonored).

² The words "impairs its collectibility" seem to be preferable to "render it valueless," the words of the Negotiable Instruments Law. The warranty should attach, if the instrument is worth fifty cents on the dollar. But such an instrument is not valueless.

³ 41 Am. L. Reg. 573. *Supra*, p. 153.

kind of discharge whether by act of the parties or by operation of law. One secondarily liable would be discharged, therefore, if any prior party should be discharged by the Statute of Limitations, or if any prior indorser should be discharged by the holder's failure to give him due notice of dishonor, and, in jurisdictions where joint obligations are not made joint and several by statute, the death of a surety co-maker would discharge all subsequent parties. A provision producing such results is a legal monstrosity. The defenders of this subsection say that it applies only to a discharge by act of the parties. But Mr. Crawford in his note to this provision states that an indorser is discharged if the claim against the maker is barred by the Statute of Limitations.¹ The same view is advanced by the commentator in the *Banking Law Journal*.² If a holder appoints an indorser his executor, the law, regardless of the intention of the parties, discharges all subsequent indorsers.³ Is this a discharge by operation of law or by the act of the parties?

But even if the operation of the subsection is limited to a discharge by the parties, it is mischievous. It would discharge the accommodated indorser if the holder, with knowledge of the accommodation, should release the accommodating maker. Judge Brewster concedes this. All possible mischief would be avoided and no loss suffered by cancelling this subsection.

SECTIONS 120-5 and 120-6. No elasticity of interpretation can correct the errors of these subsections.⁴ They declare in effect that a release of the giving of time to an accommodation acceptor or maker will discharge the accommodated drawer or indorser, and thereby overturn well-established doctrines of Suretyship. These inaccurate statements of the law of Suretyship should be eliminated.

¹ *Crawf. Ann. N. I. L.* (2d ed.) 108. It appears from this note that this subsection was inserted to bring about this very result.

² 19 *Bank. L. J.* 402.

³ *Jenkins v. Mackenzie*, 6 *Up. Can. Q. B.* 544; 4 *Am. & Eng. Enc. of Law* (2d ed.) 506, n. 6.

⁴ It has been suggested that "principal debtor" in Section 120-5 may not be synonymous with "party primarily liable." But as the "principal debtor" is contrasted with the "party secondarily liable" the words must be used in the sense of "party primarily liable." Obviously the release in Subsection 5 and the giving of time in Subsection 6, in which the words "principal debtor" do not occur, are intended to have the same operation. See Mr. McKeehan's observations in 41 *Am. L. Reg. Supra*, pp. 157-159.

SECTION 137, treating a destruction or a withholding of a bill by the drawee as an acceptance, is worse than the writer at first supposed. He criticised it as objectionable in point of form. Mr. Cohen, in his letter to Judge Brewster,¹ and Mr. McKeehan² have made it clear that the section is erroneous in principle. If the drawee of a three months' bill presented to him for acceptance should, in a fit of anger at the drawer's presumption in drawing upon him, refuse to accept it and throw it in the fire, the holder, under this section, would have no remedy on the instrument against the drawer either on the bill or for the consideration for which the bill was given until after its dishonor by non-payment. As Mr. Cohen says: "This is not in my opinion the law, and ought not to be the law." This section should be expunged.³

Each of the amendments thus far recommended would remove a difference between the English and American codes. It remains to consider two sections whose amendments would introduce a difference between the two codes.

SECTION 124. By the English decisions a material alteration of an instrument, even by a stranger, nullified it. The American courts, deeming the English precedents repugnant to justice, declined to follow them, and decided that the holder should not forfeit his rights because of this wrongful act of a stranger. The Bills of Exchange Act codified the English decisions. The Negotiable Instruments Law, instead of codifying the American decisions, abandoned them, and restored the medieval doctrine of forfeiture. Other things being equal, uniformity between the American and English law is to be encouraged. But where it is a choice between uniformity and justice, American legislators ought not to hesitate to sacrifice uniformity. Upon the point of justice in this case the words of Mr. Justice Story may be cited: "The old cases proceeded upon a very narrow ground. It seems to have been held, that a material alteration of a deed by a stranger, without the privity of either obligor or obligee, avoided the deed; and by parity of reasoning the destruction or tearing off the seal either by a stranger or by accident. A doctrine so

¹ 15 Harv. L. Rev. 38. *Supra*, p. 94.

² 41 Am. L. Reg. 583. *Supra*, pp. 161-163.

³ This section is objectionable for another reason. A drawee, who destroys the instrument, is properly liable to the holder for its collectible value, as in any case of conversion of a bill. But the fictitious acceptor, under this section, must pay the payee the face value of the bill, although the drawer is hopelessly insolvent.

repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought to have the unequivocal support of unbroken authority, before a Court of law is bound to surrender its judgment to what deserves no better name than a technical quibble.”¹ The section should be amended by adding after the word “altered” in the first line the words “by the holder.” It is believed that it would be advisable also to insert before the word “materially” in the first line the words “fraudulently and.”

SECTION 186 together with Section 89 provides that the drawer of a check is absolutely discharged by the holder's failure to give him due notice of its dishonor although the laches has not caused any loss to him. This section changes well settled law, and for the worse. Fortunately cases presenting the facts here supposed are not likely to be frequent. But this will be small consolation to the particular plaintiff when the case does arise.

To sum up, Sections 20, 65-4, 119-4, 120-3, 120-5, 120-6, and 137 are obnoxious to these three objections. They introduce unnecessary distinctions between the English and American codes. They nullify generally established and well-approved doctrines of the American and English courts. They are sure to provoke needless litigation and to cause much injustice.

Section 40 is open to the first and third objections, and furthermore nullifies the wholesome innovation of Section 9-5.

Section 186 is opposed to the American and English precedents and is doubtless due to an inadvertence of the American and English codifiers.

Section 124 is a return to archaic formalism, and the language of Judge Story, already quoted, fittingly describes its injustice.

The writer retains his conviction that it is wiser to have no code at all than to adopt the Negotiable Instruments Law in its present form. If, on the other hand, this law should be amended as suggested in this paper, the sooner it is enacted throughout the Union, the better.

JAMES BARR AMES.

¹ U. S. v. Spalding, 2 Mas. 478, 482. See the similar remarks by Beasley, C. J., in Hunt v. Gray, 35 N. J. Law 227, 233.

APPENDIX I.

[In addition to the differences already noted the Bills of Exchange Act contains the following provisions not adopted by the Negotiable Instruments Law.]

Form and Interpretation.

SEC. 8. (1) Where a bill contains words prohibiting a transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

A check payable to M's order was crossed by the drawer "account of M, National Bank, Dublin." Held, that the check contained no words prohibiting a transfer or indicating an intention that it shall not be transferred, and M's indorsee could recover from the drawer. *Seemle*, a check payable to order or to bearer can not be made non-negotiable except by crossing it in the manner provided by sec. 76. *National Bank v. Silke* [1891] 1 Q. B. 435. See S. C., *infra*, sec. 76.

SEC. 14. (3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance, if the bill be accepted, and from the date of noting or protest, if the bill be noted or protested for non-acceptance or for non-delivery.

SEC. 14. (4) The term "month" in a bill means calendar month.

Capacity and Authority of Parties.

SEC. 22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract. Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

Under the Infants' Relief Act 1874 and Bills of Exchange Act sec. 22, an infant can not be held on a bill of exchange, even though it was given for necessities and is in the hands of a holder in due course. *In re Soltykoff* [1891] 1 Q. B. 413.

Transfer.

SEC. 36. (2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and henceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

A bill drawn for the acceptor's accommodation but which had never been negotiated was in the hands of the drawer after maturity, and having come into the possession of the drawer's solicitors, the latter claimed a lien on it for services previously rendered the drawer in an action to recover the bill from a converter, and sued the acceptor on the bill. Held, that plaintiffs taking the bill overdue could acquire no rights against the acceptor. *Redfern v. Rosenthal*, 86 L. T. Rep. 855.

An overdue bill indorsed in blank was sold in Norway on a judicial proceeding against one of several joint owners of the bill. By the laws of Norway the purchaser acquired a good title as against the equity of the other joint owners. Held, that although the bill was drawn and payable in England, sec. 36 (2) of the Bills of Exchange Act was not applicable and the purchaser was entitled to the bill. *Alcock v. Smith*, [1892] 1 Ch. 238; see also *S. C. infra*, sec. 72.

In the above case Lindley J. (p. 263), said that " 'defect of title' is a phrase introduced into the Bills of Exchange Act in lieu of the old expression 'subject to equities,' which is an expression not adopted, because the Act applies to Scotland as well as to England, and 'subject to equities' is an expression not known to Scotch Law."

SEC. 36. (5) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour, takes it subject to any defect of title attaching thereto at the time of its dishonour, but nothing in this subsection shall affect the rights of a holder in due course.

Presentment for Acceptance.

SEC. 41. (1) (e) Where authorized by agreement or usage a presentment (for acceptance) through the post-office is sufficient.

Presentment for Payment.

SEC. 45. (5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

SEC. 45. (8) Where authorized by agreement or usage, a presentment (for payment) through the post-office is sufficient.

Notice of Dishonour.

SEC. 49. (6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

Protest.

SEC. 51. (6) (a) When a bill is presented through the post-office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return, if received during business hours, and if not received during business hours, then not later than the next business day.

SEC. 52. (2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

See *Gordon v. Kerr*, 25 Sess. Cas. 570 *infra*, sec. 87 (1).

SEC. 52. (3) In order to render the acceptor of a bill liable, is not necessary to protest it, or that notice of dishonour should be given to him.

Liability of Parties.

SEC. 57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser (a) the amount of the bill; (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; (c) the expenses of noting, or when protest is necessary, and the protest has been extended, the expenses of protest. (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer, or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment. (3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

The damages given by this section are liquidated so as to permit the entry of judgment under Order XIV, rule 1, which gives power to a judge at chambers to order such entry when the writ is specially indorsed under Order III, rule 6, as for a liquidated demand. *London, &c. Bank v. Clancarty*, [1892] 1 Q. B. 689. The writ was indorsed "interest until payment or judg-

ment." So also as to a claim for noting and interest from date of the writ until payment. *Lawrence v. Wilcocks*, [1892] 1 Q. B. 696.

Section 57 is not exhaustive; it only determines what shall be deemed liquidated damages, and does not prevent recovery of special unliquidated damages recoverable before the statute. *In re Gillespie*, 16 Q. B. D. 702, affirmed 18 Q. B. D. 286. See *S. C. supra*, p. 160.

Where a bill protested for better security was accepted for the honor of the drawer it was held that the acceptor could not recover the expenses of protest for better security, nor a commission for accepting, as, under sec. 57, such expenses only as are "necessary" are recoverable and a protest for better security, while permitted, is not necessary. *In re English Bank of the River Plate*, [1893] 2 Ch. 438.

The words "bank charges" are a sufficient description of the expenses of noting. *Dando v. Boden*, [1893] 1 Q. B. 318.

When a bill has been dishonored abroad, the damages are recoverable only under sec. 57 (2), and the holder has no option to sue under sec. 57 (1). *Re Commercial Bank*, 36 Ch. Div. 522.

Discharges.

SEC. 60. When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

A banker's draft payable to order on demand, addressed by one branch of a bank to another branch of the same bank and not crossed, is not a check within the meaning of secs. 60, 82, B. E. A. But it is within sec. 19 of the Stamp Act 1853, which protects bankers *bona fide* paying such drafts to holders claiming under forged indorsements. *Capital and Counties Bank v. Gordon*, [1903] A. C. 240. See *S. C., infra*, sec. 82.

Crediting a customer with the amount of a check which he has, without authority, indorsed in the name of the payee per proc. the customer is not a payment of the check within sec. 60 B. E. A., but it is within sec. 19 Stamp Act 1853. *Bissell v. Fox*, 53 L. T. Rep. 193. See *S. C., infra*, sec. 82.

Lost Instruments.

SEC. 69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenour, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid refuses to give such duplicate bill he may be compelled to do so.

SEC. 70. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

Conflict of Laws.

SEC. 72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows: (1) The validity of the bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payor be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4) Where the bill is drawn out of but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another the due date thereof is determined, according to the law of the place where it is payable.

A bill was drawn in France (before the Act) by a Frenchman in French, but in English form on an English company, which accepted it. The drawer indorsed the bill in blank and sent it to an Englishman in England. Held, that the acceptor can not dispute the negotiability of the bill because the indorsement was invalid by French law. *Re Marseilles Co.*, 30 Ch. Div. 598.

Interpretation here means "legal effect." *Alcock v. Smith*, [1892] 1 Ch. 238, 256, *semble*. See *S. C. supra*, sec. 36 (2). See also *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 667.

Cheques.

SEC. 75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by: (1) Countermand of payment; (2) Notice of the customer's death.

A check to order of A delivered as a gift *causa mortis* was presented before death, but the banker refused payment because doubtful of the signature of the drawer, who died before it could be confirmed. Held, that the check was revoked by the death. *In re Beaumont*, [1902] 1 Ch. 889.

A banker is authorized to pay a bill accepted by a customer payable at the bank, but is not bound to do so in the absence of a special arrangement. *Bank of England v. Vagliano*, [1891] A. C. 107, 157. *semble*. See also *Chalmers, Bills of Exchange*, 6th ed. 255.

On October 31st plaintiff drew a check on defendant bankers. On the same day he telegraphed to countermand payment. The telegram was delivered the same day after office hours and put in the letter box in the door of the bank. By an oversight on the part of defendant's servants the telegram was not brought to the notice of their manager until November 2d. On November 1, the check was presented and paid. Held, that payment was not in fact countermanded within section 75 B. E. A. although it might be that it was due to negligence of the bank officials that the notice was not received in time to stop payment. If defendant was liable at all it would be in damages for negligence. *Curtice v. London City & Midland Bank*, [1908] 1 K. B. 293.

Crossed Cheques.

SEC. 76. (1) Where a cheque bears across its face an addition of

- (a) The words "and company" or any abbreviation thereof between two parallel transverse lines; either with or without the words "not negotiable"; or,

(b) Two parallel lines simply, either with or without the words "not negotiable"; that addition constitutes a crossing and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of the banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

A check drawn payable to the order of M was crossed "account of M, National Bank, Dublin." This did not make the check non-transferable. *National Bank v. Silke*, [1891] 1 Q. B. 435; S. C. *supra.*, sec. 8 (1).

SEC. 77. (1) A cheque may be crossed generally or specially by the drawer. (2) Where a cheque is uncrossed, the holder may cross it generally or specially. (3) Where a cheque is crossed generally, the holder may cross it specially. (4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable." (5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection. (6) Where an uncrossed cheque, or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself.

SEC. 78. A crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing.

SEC. 79. (1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof. (2) When the banker on whom a cheque is drawn which is so crossed

nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to a banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated, or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed or to his agent for collection being a banker as the case may be.

SEC. 80. Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same rights, and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

SEC. 81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

A check crossed "not negotiable" was payable to a firm or order. One partner in fraud of his co-partner indorsed the check to defendant, who cashed it. Held, that the other partner, who by the partnership agreement was entitled to it, could recover the amount from defendant. *Fisher v. Roberts*, 6 T. L. R. 354.

SEC. 82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title, or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque, by reason only of having received such payment.

It is negligence for a bank to place to the credit of the secretary of a company the amount of a check drawn payable to the company or order, and crossed generally and indorsed by the secretary with the name of the company and his own name, without making any inquiries as to the authority of the secretary to deal with the check. *Hannan's Lake View Central v. Armstrong*, 5 Commercial Cas. 188.

A stranger having wrongfully obtained possession of a crossed check specially indorsed, obliterated the special indorsement, substituted one to himself, and presented the check to the defendant bank, to collect for him. The defendant collected the check and paid the money to the stranger. Held, that defendant was liable to the special indorsee for conversion of the check. *Kleinwort v. Comptoir National d'Escompte de Paris*, [1894] 2 Q. B. 157; *Lacave v. Crédit Lyonnais*, [1897] 1 Q. B. 148, accord.

Where the only transaction between an individual and a bank is the collection of a crossed check, such individual is not a customer of the bank. *Mathews v. Williams & Co.*, 10 Reports, 210; 63 L. J. Q. B. D. 494.

One for whom a bank has been in the habit of cashing checks is not a customer, and the bank is not protected by sec. 82 in obtaining for him payment of a check crossed "& Co.," and marked "not negotiable," and which he had obtained by fraud. *Great Western R'y v. London & County Bank*, [1901] A. C. 414.

A customer of a banker stole a crossed check, forged the indorsement of the payee, and paid it into his own account. The banker is protected in receiving payment of the check and thereafter placing it to his customer's account, even though the account was overdrawn at the time of the deposit. *Clarke v. London & County Bank*, [1897] 1 Q. B. 552, as explained in *Gordon v. London, &c., Bank*, [1902] 1 K. B. at p. 270.

But if the banker at once credits the customer's account with the amount of the check, and allows him to draw against it, the banker in receiving payment of this check is not collecting it

for a customer, but for himself as holder, and is not protected by the section, and the true owner can recover from the banker. *Capital & Counties Bank v. Gordon*, [1903] A. C. 240, See S. C., *supra*, sec. 60.

But merely crediting the customer in the books of the bank with the amount of the crossed check before collecting it without notifying the customer or allowing him to draw against it, does not make the banker a purchaser or deprive him of the protection of section 82. *Akrokerri Mines v. Economic Bank*, [1904] 2 K. B. 465. *Quaere*, would not the result have been different if the entries had been made in the customer's pass-book? *Ib.* p. 470.

A banker does not lose the protection of this section merely because, before a crossed check paid in by a customer is cleared, he makes a credit entry in the bank's books or in the pass book not communicated to the customer. *Bevan v. The National Bank* (K. B. Div. Nov. 14, 1906) 23 T. L. Rep. 65.

By an Act August 4, 1906, section 82 was amended so as to get rid of the decision in *Capital and Counties Bank v. Gordon*, *supra*, by providing that a banker receives payment of a crossed check for a customer within the meaning of section 82 notwithstanding he credits his customers' account with the amount of the check before receiving payment thereof.

If the check is indorsed in the name of the payee per proc., the customer, the banker is put upon inquiry as to the right of the customer to indorse the check, and failure to make inquiry is negligence. *Bissell v. Fox*, 51 L. T. Rep. 663, affirmed 53 L. T. Rep. 193. See S. C., and also *Capital and Counties Bank v. Gordon*, *supra*, sec. 60.

Promissory Notes.

SEC. 84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

SEC. 85. (1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenour.

SEC. 87. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable.

By virtue of section 52 (2) failure to present to the maker on the day of maturity a note made payable at a particular place does not discharge the maker. Presentment at the particular place on a subsequent day is sufficient. *Gordon v. Kerr*, 25 Sess. Cas. 570.

SEC. 87. (3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

SEC. 89. (1) Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications to promissory notes. (2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order. (3) The following provisions as to bills do not apply to notes; namely, provisions relating to,—
(a) Presentment for acceptance; (b) Acceptance;
(c) Acceptance *supra* protest; (d) Bills in a set.
(4) Where a foreign note is dishonoured, protest thereof is unnecessary.

The “necessary modifications” referred to in section 89 (1) would exclude Bank of England notes from the operation of the proviso of section 64 (1) (same as second sentence of section 124 N. I. L.) *Leeds & County Bank v. Walker*, 11 Q. B. D. 84.

Dividend Warrants.

SEC. 95. The provisions of this Act as to crossed cheques shall apply to a warrant for the payment of dividend.

Repeals.

SEC. 96. The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned. Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

Savings.

SEC. 97. (1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto, notwithstanding anything in this Act contained.

SEC. 97. (3) Nothing in this Act or in any repeal effected thereby shall affect—

- (a) The provisions of the Stamp Act, 1870 or acts amending it, or any law or enactment for the time being in force relating to the revenue; (b) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies; (c) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively; (d) The validity of any usage relating to dividend warrants or the indorsement thereof.

Construction with other Acts.

SEC. 99. Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

Scotland.

SEC. 98. Nothing in this Act, or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

SEC. 100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenour of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require. This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note, has undergone the sesennial prescription.

APPENDIX II.

COMPARATIVE TABLES OF SECTIONS OF BILLS OF EXCHANGE
ACT AND NEGOTIABLE INSTRUMENTS LAW.

[In these tables a blank opposite a section of the one act indicates that there is no exactly corresponding section of the other act. The word "See" before a section of the one act indicates, in general, that the section is not the exact equivalent of the opposite section of the other act, but differs, in some cases substantially, in others only slightly. Or the section may sometimes merely suggest a similarity or an analogy.]

TABLE I.

N. I. L.	B. E. A.	N. I. L.	B. E. A.
1.	See 8 (1), 3 (2), 83 (1).	17-2.	9 (3).
1-1-2-3.	See 3 (1).	17-3-4-5.	
1-4.	See 3 (1), 8 (2), 83 (1).	17-6.	See 56.
1-5.	6 (1).	17-7.	85 (2), promissory note.
2-1-2-3-4.	9 (1).	18.	23, 23 (1), and see 23 (2).
2-5.		19.	See 91.
3-1-2.	3 (3).	20.	See 26 (1), (2).
4-1.	11 (1).	21.	25.
4-2.		22.	22 (2).
4-3.	11 (2).	23.	24.
5.	3 (2).	24, first clause.	
5-1.	83 (3), promissory note.	24, second clause.	30 (1).
5-2-3-4.	See 16 (2).	25.	See 27 (1) (a) (b).
6-1-2-3.	3 (4).	26.	27 (2).
6-4.	See 91 (2).	27.	27 (3).
6-5.		28.	
7-1-2.	10 (1) (2).	29.	28 (1), (2).
8.	See 8 (4), 8 (5).	30.	31 (1), (2), (3).
8-1.		31.	See 32 (1).
8-2-3.	5 (1).	32, except last paragraph.	32 (2).
8-4.	7 (2).	32, last paragraph.	
8-5.	See 7 (2).	33.	See 32 (6).
8-6.	7 (2).	34, first paragraph, first clause.	34 (2).
9-1-5.	8 (3).	34, first paragraph, second clause.	See 34 (3).
9-2-4.		34, last paragraph.	34 (1), 31 (2).
9-3.	See 7 (3).	35.	See 34 (4).
10.		36.	See 35 (1).
11.	13 (1).	37.	35 (2), (3).
12, first paragraph.	See 13 (2).	38.	See 16 (1).
12, last paragraph.		39, first paragraph.	33.
13.	See 12.	39, last paragraph.	
14.	See 20 (1), (2).	40.	
15.			
16.	21 (1), (2), (3).		
17-1, first clause.	9 (2).		
17-1, second clause.			

TABLE I (*continued*).

N. I. L.	B. E. A.	N. I. L.	B. E. A.
41.	32 (3).	76.	45 (7).
42.		77.	See 45 (6).
43.	32 (4).	78.	45 (6).
44.	31 (5).	79.	See 46 (2) (c).
45.	36 (4).	80.	46 (2) (d).
46.		81.	46 (1).
47.	36 (1).	82-1.	See 46 (2) (a).
48.		82-2.	46 (2) (b).
49, first paragraph.	31 (4).	82-3.	46 (2) (e).
49, last paragraph.		83.	47 (1).
50.	37.	84.	47 (2).
51, first clause.	38 (1).	85.	See 14 (1).
51, last clause.	See 38 (3).	86.	14 (2).
52-1-2-3.	29 (1) (a) (b).	87.	
52-4.	See 29 (1) (b).	88.	59 (1), last para-
53.	See 36 (3), bill, 86 (3), note, 73, check.		graph.
54.		89.	48.
55.	29 (2).	90.	See 49 (1).
56.	See 90.	91.	49 (2).
57.	See 38 (2).	92.	See 49 (3).
58, first paragraph.		93.	See 49 (4).
58, last paragraph.	See 29 (3).	94.	49 (13).
59, first paragraph.	See 30 (2).	95.	49 (7).
59, last paragraph.		96.	See 49 (5), 49 (15).
60.	See 88 (1), (2).	97.	49 (8).
61, first paragraph.	See 55 (1).	98, except last para-	
61, last paragraph.	16 (1).	graph.	49 (9).
62.	54.	98, last paragraph.	
62-1-2.	See 54 (2) (a) (b) (c).	99.	See 49 (11).
63.	See 56.	100.	49 (11).
64.		101.	See 49 (10).
65-1-2-3-4.	See 58 (1), (2), (3).	102.	See 49 (12).
66.	See 55 (2).	103.	See 49 (12) (a).
67.	See 56.	104-1.	49 (12) (b).
68, first paragraph.	See 32 (5).	104-2.	
68, last paragraph.		105.	49 (15).
69.		106.	
70, first paragraph,	See 52 (1), (2), bill,	107.	49 (14).
first clause.	87 (1), note.	108.	
70, first paragraph,		109.	50 (2) (b).
second clause.		110.	
70, last paragraph.	45, bill, 87 (2), note.	111.	
71, first paragraph.	45 (1).	112.	50 (2) (a).
71, second para-	See 45 (2), bill, 86 (1), note.	113.	50 (1).
graph.		114-1-2-3-5.	50 (2) (c).
72-1-2-3.	45 (3).	114-4.	See 50 (2) (c) (4); Chalmers, 6th ed. 171.
72-4.	See 45 (3).		50 (2) (d).
73-1.	45 (4) (a).	115.	48 (2).
73-2.	45 (4) (b).	116.	48 (1).
73-3.	See 45 (4) (c).	117.	
73-4.	45 (4) (d).	118.	See 51 (1), (2), bill, 89 (4), note.
74.	52 (4).	119-1.	59 (1).
75.		119-2.	59 (3).

TABLE I (*continued*).

N. I. L.	B. E. A.	N. I. L.	B. E. A.
119-3.	See 63 (1), (2).	154.	See 94.
119-4.		155.	See 51 (4), 93.
119-5.	61.	156.	51 (6), and 51 (6) (b).
120-1-3-4-5-6.		157.	51 (3).
120-2.	See 63 (2).	158.	See 51 (5).
121, 121-1.	See 59 (2) (a) (b).	159.	51 (9).
121-2.	59 (3).	160.	51 (8).
122.	62 (1), (2).	161, first paragraph.	65 (1).
123.	63 (3).	161, second para- graph, first clause.	65 (2).
124, first paragraph.	64 (1).	161, second para- graph, second clause.	
124, second para- graph.	See 64 (1), proviso.	162.	See 65 (3).
125-1-3.	64 (2).	163.	65 (4).
125-2-4-5.	See 64 (2).	164.	66 (2).
126.	See 3 (1), (2), 8 (4).	165.	66 (1).
127.	See 53 (1), (2).	166.	65 (5).
128.	See 6 (2).	167.	67 (1).
129.	See 4 (1), (2).	168.	See 67 (2).
130.	5 (2).	169.	See 67 (3).
131.	15.	170.	67 (4).
132, first paragraph.	17 (1), see 21 (1).	171.	68 (1).
132, second para- graph.	See 17 (2) (a).	172.	68 (3).
132, third paragraph.	17 (2) (b).	173.	68 (4).
133.		174.	68 (2).
134.		175.	68 (5).
135.		176.	68 (7).
136.	See 42.	177.	See 68 (6).
137.		178.	71 (1).
138.	18 (1), (2), (3).	179.	71 (3).
139.	19 (1), (2).	180.	71 (2).
140.	19 (2) (c), last paragraph.	181.	See 71 (4).
141.	19 (2).	182.	71 (5).
142, first paragraph.	44 (1).	183.	71 (6).
142, second para- graph.	See 44 (2).	184, first paragraph.	See 83 (1).
142, third paragraph.	44 (3).	184, last paragraph.	See 83 (2).
143-1.	See 39 (1).	185.	73.
143-2-3.	39 (2), (3).	186.	See 74 (1).
144.	See 40 (1).	187.	
145.	41 (1) (a).	188.	
145-1.	41 (1) (b).	189.	See 53 (1), 73.
145-2.	41 (1) (c).	190.	See 1.
145-3.	See 41 (1) (d).	191, except "Accept- ance," "Bank," "Bill" and "In- strument."	2.
146.	See 92.	191, "Acceptance."	2-21 (1), last paragraph.
147.	39 (4).	191, "Bank."	See 2.
148-1.	See 41 (2) (a).	191, "Bill."	See 2.
148-2.	41 (2) (b).	191, "Instrument."	
148-3.	41 (2) (c).	192.	
149-1-2.	43 (1) (a) (b).		
150.	See 42.		
151.	43 (2).		
152.	51 (2).		
153.	See 51 (7).		

TABLE I (*continued*).

N. I. L.	B. E. A.	N. I. L.	B. E. A.
193.	40 (3), 45 (2) 73, 74 (2), 86 (2), 89 (1).	195. 196. 197. 198.	See 97 (2).
194.	See 14 (1) (a) (b), 92.		

TABLE II.

B. E. A.	N. I. L.	B. E. A.	N. I. L.
1.	See 190.	19 (1), (2).	139.
2.	See 191.	19 (2) (a) (b) (d) (e).	141-1-2-4-5.
3.	See 126.	19 (2) (c), first para- graph.	141-3.
3 (2).	5.	19 (2) (c), last para- graph.	140.
3 (3).	3.	20.	See 14.
3 (4).	6.	21 (1), first para- graph.	16.
4 (1), (2).	See 129.	21 (1), second para- graph.	16.
5 (1).	8-2-3.	21 (2), (3).	16.
5 (2).	130.	22 (1).	See 22.
6 (1).	1-5.	22 (2).	18.
6 (2).	128.	23, 23 (1).	23.
7 (1).	See 8-6, second paragraph.	23 (2).	21.
7 (2).	See 8-4-5-6.	24, first paragraph.	See 20.
7 (3).	See 9-3.	24, last paragraph.	25.
8 (1).	See 1-4.	25.	26.
8 (2).	9-1-5.	26 (1).	27.
8 (3).	See 8.	26 (2).	29.
8 (4).	See 8.	27 (1).	52-1.
8 (5).	See 2.	27 (2).	52-2.
9 (1).	17-1.	27 (3).	See 52-3-4.
9 (2).	17-2.	28 (1), (2).	55.
9 (3).	7-1-2.	29 (1).	See 58.
10 (1).	7-2, last para- graph.	29 (1) (a).	24, second clause.
10 (2).	4.	29 (1) (b).	See 59.
11.	4-1.	29 (2).	30.
11 (1).	4-3.	29 (3).	49.
11 (2).	See 13.	30 (1).	44.
12.	11.	30 (2).	See 31.
13 (1).	See 12.	31 (1), (2), (3).	32.
13 (2).	See 85.	31 (4).	41.
14 (1).	86.	31 (5).	43.
14 (2).	131.	32 (1).	See 68.
14 (3).	61.	32 (2).	See 33.
14 (4).	See 5-3.	32 (3).	See 39.
15.	132.	32 (4).	See 34.
16 (1).	See 132.	32 (5).	
16 (2).	132.	32 (6).	
17 (1).	138.	33.	
17 (2) (a).		34 (1), (2), (3).	
17 (2) (b).			
18.			

TABLE II (*continued*).

B. E. A.	N. I. L.	B. E. A.	N. I. L.
34 (4).	See 35.	48 (2).	116.
35 (1).	See 36.	49 (1).	See 90.
35 (2), (3).	See 37.	49 (2).	91.
36 (1).	47.	49 (3).	92.
36 (2).		49 (4).	93.
36 (3).	See 53.	49 (5).	See 96.
36 (4).	45.	49 (6).	
36 (5).		49 (7).	95.
37.	50.	49 (8).	97.
38 (1).	51.	49 (9).	See 98.
38 (2).	See 57.	49 (10).	See 101.
38 (3) (a).		49 (11).	100.
38 (3) (b).	See 51.	49 (12).	See 102, 103, 104.
39 (1), (2), (3).	See 143.	49 (13).	94.
39 (4).	147.	49 (14).	107.
40 (1), (2).	See 144.	49 (15).	96, 105.
40 (3).	See 193.	50 (1).	113.
41 (1) (a).	145.	50 (2) (a).	112.
41 (1) (b).	145-1.	50 (2) (b).	109.
41 (1) (c).	145-2.	50 (2) (c).	114.
41 (1) (d).	See 145-3.	50 (2) (d).	115.
41 (1) (e).		51 (1).	See 118.
41 (2) (a).	See 148-1.	51 (2).	152.
41 (2) (b).	148-2.	51 (3).	157.
41 (2) (c).	148-3.	51 (4).	See 155.
41 (3).		51 (5).	See 158.
42.	See 150.	51 (6) (a).	
43 (1) (a).	149-1.	51 (6) (b).	156.
43 (1) (b).	149-2.	51 (7).	See 153.
43 (2).	151.	51 (8).	160.
44 (1), (2), (3), except second paragraph of (2).	142.	51 (9).	159.
44 (2), second para- graph.		52 (1).	See 70.
45.	See 70.	52 (2).	
45 (1).	71.	52 (3).	
45 (2).	See 71.	52 (4).	74.
45 (2), last para- graph.	See 193.	53 (1).	See 127.
45 (3).	See 72.	53 (2).	
45 (4).	See 73.	54 (1).	62.
45 (5).		54 (2).	See 62-1-2.
45 (6).	78.	55 (1) (a).	See 61.
45 (7).	76.	55 (1) (b).	See 61.
45 (8).		55 (2) (a).	See 66-2, last para- graph.
46 (1).	81.	55 (2) (b) (c).	See 66.
46 (2) (a) (b).	See 82-1-2.	56.	See 17-6, 63, 67
46 (2) (c).	See 79.	57.	
46 (2) (d).	80.	58.	See 65.
46 (2) (e).	82-3.	59 (1).	119-1, 88.
47 (1).	83.	59 (2) (a) (b).	See 121, 121-1.
47 (2).	84.	59 (3).	See 121-2.
48.	89.	60.	
48 (1)	117.	61.	119-5.
		62 (1), (2).	122.
		63 (1).	See 119-3.
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